In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-623

TED BUTLER AND EMIL PETERS, [redacted],
Appellants,

vs.

RICHARD C. DEXTER,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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October 23, 1975

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JURISDICTIONAL STATEMENT

Appellants appeal from the written opinion and order of the United States District Court for the Southern District of Texas, filed on July 3, 1975, and as the same was amended on August 29, 1975. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court for the Southern District of Texas, Houston Division, is not yet reported. Copies of the opinion and the amendment thereto are attached hereafter as Appendices A and B.

JURISDICTION

The suit was brought under 28 U.S.C. §§ 1331, 1332, 1343(3) and (4), 42 U.S.C. §§ 1983 and 1985(3), and 28 U.S.C. §§ 2201 and 2281, to enjoin the District Attorney of Bexar County, Texas, and the San Antonio, Texas, Chief of Police from arresting and prosecuting appellee under the Texas Obscenity Statutes, Vernon's Tex. Penal Code, §§ 43.21 and 43.23, and the Texas Criminal Instruments Statute, Vernon's Tex. Penal Code, § 16.01, and to declare these statutes unconstitutional. The decision of the District Court was rendered on July 3, 1975, and amended on August 29, 1975. Appellants' notice of appeal from the court's original opinion and order was filed on August 25, 1975, in the United States District Court for the Southern District of Texas. After the court's amendment to its original opinion and order on August 29, 1975, a second notice of appeal was filed by appellants in the United States District Court for the Southern District of Texas on September 10, 1975. These notices of appeal are attached hereto as Appendices C and D. A judgment has not yet been entered by the District Court. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

1. Was the composition of the three-judge District Court proper so as to permit a disposition of appellee's case where (1) the case originated in another district, (2) the appellants were never given notice of the request by the district judge for convention of a three-judge panel, and (3) the district judge making the request was not

designated a member of the panel as required by 28 U.S.C. § 2284(1)?

2. Did the managing judge of the three-judge District Court abuse his injunctive authority under 28 U.S.C. § 2284(3) and Rule 65(b), Federal Rules of Civil Procedure, by granting successive temporary restraining orders for a period of 339 days, such temporary restraining orders being entered ex parte, without notice and hearing, and over the objection of appellants?

3. Does *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), require a final determination by a jury that the motion picture film "Deep Throat" is obscene before subsequent copies of that same film can be seized, even though a prior judicial determination of the film's probable obscenity is made by a neutral magistrate in an adversary hearing before each seizure?

4. Did the four separate seizures of the film "Deep Throat" and arrests of theater employees constitute bad faith and harassment by State law enforcement officials, even though each seizure and arrest was made pursuant to a warrant issued by a neutral magistrate after a full adversary hearing?

5. Did the three-judge District Court violate the mandatory requirements of *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Perez* v. *Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971), by enjoining appellants from proceeding with pending State criminal prosecutions against appellee without first permitting the State courts to apply and interpret the State law in the pending criminal cases?

STATUTES INVOLVED

Sections 16.01, 43.21 and 43.23 of the Texas Penal Code (Vernon's Tex. Penal Code §§ 16.01, 43.21, and 43.23), Sections 2281 and 2284 of Title 28, United States Code (28 U.S.C. §§ 2281 and 2284), and Rule 65(b) of the Federal Rules of Civil Procedure are set forth in Appendix E hereto.

STATEMENT OF THE CASE

Appellants are Ted Butler, the Criminal District Attorney of Bexar County, Texas, and Emil Peters, the Chief of Police of San Antonio, Texas. Appellee Richard C. Dexter was the employee and manager of an "adult" motion picture theater in San Antonio known as the Fiesta Theater.

On June 24, 1974, a San Antonio police officer dressed in civilian clothes approached the ticket window at the Fiesta Theater and paid the $5.00 admission. The theater marquee indicated that the film "XXX Deep Throat" was being shown inside. The officer entered the theater, viewed the entire film, returned to his office, and prepared a report. He then presented to a magistrate[1] the report and a motion requesting that an adversary hearing be conducted to determine whether a warrant should issue for confiscation of the film "Deep Throat" for violation of the Texas Obscenity Statutes. After placing the officer under oath and questioning him as to the content of the film, the magistrate entered an order setting the matter

1. Bexar County Justice of the Peace Fred Clark.

for hearing. At the magistrate's direction, appellee was served with written notice of the magistrate's order and advised to notify his attorney to appear at the hearing. An hour later, the magistrate arrived at the theater and again advised appellee to contact his attorney and have him present at the hearing. Appellee informed the magistrate that he had already conferred with counsel over the phone and, upon the advice of his attorney, would waive appearance of counsel at the hearing. The magistrate then offered to appoint counsel for appellee. Appellee, however, declined this offer and stated that he wanted to proceed with the adversary hearing. Without disturbing patrons in the theater and without interrupting exhibition of the film, the magistrate conducted a hearing in the theater lobby. The State, represented by an Assistant District Attorney, called the officer who had earlier viewed the film to testify. The officer was sworn and described the content of the film "Deep Throat" being shown at the Fiesta Theater. He identified the film then being shown as the same film he had viewed previously, and he identified appellee as the individual operating the theater. Appellee declined to cross-examine the officer or present any evidence in his own behalf. The magistrate then found probable cause to view the film and did so. After viewing the film and finding it obscene, he issued a warrant for the seizure of the film "Deep Throat" and the projector upon which it was being shown and ordered the arrests of appellee and another theater employee for violating the Texas Commercial Obscenity Statute, Vernon's Tex. Penal Code, § 43.23, and the Texas Criminal Instruments Statute, Vernon's Tex. Penal Code, § 16.01. Appellee immediately posted a $25,000 bond and was released. The other theater employee arrested was released upon her own personal recognizance.

Thereafter, the film "Deep Throat" was again exhibited commercially at the Fiesta Theater. On June 28, 1974, July 2, 1974, and July 6, 1974, upon the requests of police officers, magistrates[2] conducted adversary hearings as described above and on each occasion ordered the seizure of a single copy of the film and the projector upon which the film was shown and the arrest of the theater operator. During each adversary hearing the theater continued to operate as usual (patrons were not disturbed and the film continued to be shown) except for the interruption occasioned by the seizure of the film itself.[3] Appellee and another theater operator of the Fiesta Theater at the time of their arrests were allowed to secure the premises and take custody of their cash receipts. Felony bonds were required on each occasion by a magistrate, but no recommendations as to the amount of bond was made by appellants, their assistants, or any police officer. Felony complaints were filed against appellee for violation of the Criminal Instruments Statute and placed on the calendar for grand jury consideration. Since grand jury action was unnecessary for further proceedings in the misdemeanor commercial obscenity cases against appellee, the cases were set for trial in the Bexar County Court at Law No. 3 on September 16, 1974.

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2. Bexar County Justices of the Peace Fred Clark and J. P. Gutierrez and County Judge Blair Reeves.

3. The magistrates of Bexar County instituted the practice of holding adversary hearings at the theater proper because in the past when notices were served upon theater operators that an adversary hearing was to be conducted by the magistrate on a specified date in court for the purpose of viewing the film alleged to be obscene, theater operators, in order to prevent the magistrate from viewing the film, would either immediately ship the film outside the court's jurisdiction or would appear with a substituted film wholly different from the film which was shown at the theater and which was the subject of the hearing.

On July 12, 1974, appellee filed his complaint in the United States District Court for the Western District of Texas,[4] praying that Sections 43.21 and 43.23 and Section 16.01 of the Texas Penal Code be declared unconstitutional as written and applied and that appellants be enjoined from further arrests and prosecutions under these statutes. Accompanying appellee's complaint were motions for temporary restraining order (hereinafter referred to as "TRO") and for convention of a three-judge court. The complaint and motions were presented to the Honorable Adrian A. Spears, Chief Judge for the Western District of Texas, who, without advising appellants, declined to grant ex parte the motion for TRO. Judge Spears then assigned the case to the Honorable John H. Wood, Jr., also of the Western District of Texas, because of Judge Wood's familiarity with obscenity matters. Judge Wood also refused to issue an ex parte TRO. However, without notifying appellants, Judge Wood requested that the Honorable John R. Brown, Chief Judge for the United States Court of Appeals for the Fifth Circuit, convene a three-judge panel to hear the case.

On July 22, 1974, without notice to appellants, Judge Brown entered an order consolidating the case with several other obscenity cases then pending before an already designated three-judge panel in the Southern District of Texas, Houston Division. Neither Judge Wood nor any other judge from the Western District of Texas was named as a member of the panel.

On July 29, 1974, the Honorable John V. Singleton, Jr., District Judge for the Southern District of Texas and the managing judge for the three-judge panel, granted

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4. Appellee alleged that the District Court had jurisdiction of the case under 28 U.S.C. §§ 2201 and 2281 and 42 U.S.C. § 1983.

appellee's motion for TRO ex parte without notice to appellants and without conducting a hearing. The language of this TRO provided that appellants were

> ". . . restrained and enjoined from further seizures of versions of the film 'Deep Throat' at the Fiesta Theater, San Antonio, Texas, and from arresting plaintiff, or employees of said theater, so long as 'Deep Throat' is showing at the Fiesta Theater, San Antonio, Texas . . ."

Only until appellants read the local newspapers a few days later, did they learn that they were under a TRO[5] and that the case had been transferred to the Southern District of Texas.

Appellants filed separate answers to appellee's complaint. Appellant Butler's answer filed on August 6, 1974, incorporated a motion to dismiss the action because jurisdiction had not attached "for the convention of a three-judge court under Title 28 U.S.C. § 2281" and because appellee had failed to allege bad faith and harassment by appellants. Appellant Butler also filed a motion to dissolve the TRO, which was never acted on by the court.[6]

On August 9, 1974, however, Judge Singleton entered a second order, again ex parte and without notice and hearing, which extended his previous TRO.

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5. As to notice of a TRO, Rule 65(d), Federal Rules of Civil Procedure, provides as follows:

> ". . . every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

6. Appellant Butler filed a second motion for dissolution of the TRO's issued by Judge Singleton and for dismissal of the case on October 16, 1974. No rulings were ever entered by the court on this subsequent motion.

On August 12, 1974, Judge Singleton presided over a conference of counsel in Houston involving 15 consolidated obscenity cases, including the instant case, which had been pending before the three-judge court.[7] At the conference, Judge Singleton indicated that in his opinion the Criminal Instruments Statute was vague and overbroad and that he was prepared to give an immediate ruling on the constitutionality of the statute.[8] Counsel for appel-

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7. The majority of these cases originated in the Western, Northern, and Eastern Districts of Texas and were consolidated by order of Chief Judge John R. Brown with *Universal Amusement Co., Inc., et al.* v. *Carol Vance, et al.*, No. 73-H-528, an obscenity case arising in the Southern District of Texas. The issues in the *Universal Amusement* case were limited solely to the constitutionality of the old Texas Obscenity Statute, Article 527, Tex. Penal Code (1925), which was replaced by Sections 43.21-43.24 of the 1974 Texas Penal Code. It should be noted that a dismissal of the *Universal Amusement* case, the case in which the three-judge court was first convened, was announced by Judge Singleton at the beginning of the conference of counsel on August 12, 1974. The dismissal was entered of record on August 20, 1974.

8. The transcript of the proceedings contains the following discussion between Judge Singleton and two of the attorneys present:

> "MR. COIL: The new penal code. And we are attacking that [the Criminal Instruments Statute, Section 16.01] because it is overbroad. And under the way the district attorney of Fort Worth is interpreting the law, if he arrests a speeder and gives up to a $200 traffic ticket, he could take the man's car and file a felony on him for possession of that criminal instrument of the car. We have been threatened by that.
> "MR. ARANSON: Would you like to have it, Your Honor?
> "THE COURT: Yes. Let me see so I'll know what we are talking about. 16.01?
> "MR. COIL: Yes, sir.
> "THE COURT: I didn't know they had this type of statute. This would permit the law enforcement agencies to seize anything, couldn't they?
> "MR. COIL: They could seize a fountain pen from a forger. Yes, sir.
> "THE COURT: A fountain pen from a forger. And you are attacking this statute as being vague and overbroad?
> "MR. COIL: Yes, sir.
> "THE COURT: Do you want a ruling now?
> "(Laughter.)" Transcript, Conference of Counsel, August 12, 1974, pp. 78-79.

lant Butler nevertheless again moved for dissolution of the successive TRO's and for an immediate evidentiary hearing on the *Younger* v. *Harris* issues. After counsel for appellant Butler refused to enter into an agreed temporary injunction, Judge Singleton declared that he would continue to grant successive TRO's against appellants indefinitely without notice and hearing (as opposed to a temporary injunction) because he felt mandamus would not lie against him so long as he issued TRO's.[9] Judge Singleton also stated that a temporary injunction would be entered to "apply to every case here except the Dexter case."[10] Upon Judge Singleton's insistence, counsel for the parties in the instant case and two others agreed to prepare pre-trial orders containing stipulated facts which would be submitted to the court.

On August 23, 1974, Judge Singleton again entered an order, ex parte and without notice and hearing, extending the TRO.[11]

Further written TRO's were not forthcoming from Judge Singleton. However, on or about September 4, 1974, Judge Singleton informed counsel for appellant Butler by phone that the TRO's previously entered would continue

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9. The transcript of the proceedings reflects the following:

"MR. BURRIS: Your Honor, I just have to stand here and keep objecting to any extension of temporary restraining order.

"THE COURT: Well, you can—I'm not worried about getting mandamused on that, on the ten-day T.R.O., because I can do that ex parte really." Transcript, Conference of Counsel, August 12, 1974, p. 182.

10. A later order entered by Judge Singleton on August 20, 1974, indicates that, except for the instant case and two others, ". . . a temporary injunction has been or will be entered pending the final disposition of these cases by a three-judge federal court."

11. This order bears a file-mark by the clerk dated August 23, 1974, but the handwritten date appearing above Judge Singleton's signature indicates that the order was signed on August 26, 1974.

in succession regardless of whether additional orders were entered in writing.

On September 6, 1974, Judge Singleton entered a "Temporary Restraining Order" in the consolidated cases ordering that ". . . all State proceedings and activities with regard to the Plaintiffs in the consolidated cases be enjoined and stayed until the three-judge panel can meet and decide the causes . . ." The order also specifically enjoined and prohibited any further arrests and seizures of the plaintiffs in the consolidated cases until the three-judge court could meet. Four of the consolidated cases, however, were expressly excluded from the terms of the order, but the instant case was not one of them.

The misdemeanor commercial obscenity cases against appellee were called for trial on September 16, 1974, in the Bexar County Court at Law No. 3. Trial, however, did not proceed as scheduled and was postponed because appellee at the time had left the State of Texas. Appellee's attorney later obtained two more continuances for this and a variety of other reasons and even sought a fourth, which was denied. During this entire period of time, since the first TRO, the motion picture "Deep Throat" continued its run at the Fiesta Theater. Exhibition of the film ceased in October, 1974, when it ended its run and was shipped out of San Antonio to another city.

After the film "Deep Throat" had ended its run in San Antonio, appellee voluntarily appeared for trial of his misdemeanor obscenity cases in the Bexar County Court at Law No. 3. He was convicted on November 18, 1974, by a jury for commercially exhibiting obscene matter, i.e., the film "Deep Throat."[12]

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12. Appellee gave notice of appeal and has thus far requested and received six consecutive extensions of time in which to file his appellate brief in the Texas Court of Criminal Appeals.

On November 15, 1974, while appellee's State court obscenity case was being tried, the three-judge court heard the arguments of counsel in the instant case and two other consolidated cases. In this proceeding Judge Singleton openly expressed his opinion that the Texas Criminal Instruments Statute was unconstitutional.

The original felony complaints filed against appellee for possession of criminal instruments under Section 16.01 of the Texas Penal Code have remained pending since the inception of these proceedings in federal court. The complaints have been deliberately withheld by appellant Butler from consideration by the Bexar County Grand Jury because of the successive TRO's, both written and oral, issued by the managing judge of the three-judge court and his pronouncements from the bench indicating that the Texas Criminal Instruments Statute would be held unconstitutional.

On July 3, 1975, the three-judge court delivered its opinion and order in the consolidated cases. In appellee's case, one of three cases written on at length, the court declared the Criminal Instruments Statute, Section 16.01, unconstitutional as applied to appellee and enjoined appellants from prosecuting appellee or any other motion picture exhibitor under the statute. The court rejected the argument that *Younger* v. *Harris, supra,* precluded federal injunctive relief. In the court's view, appellants had engaged in bad faith and harassment by charging appellee with felonies under a manifestly inappropriate statute, by conducting multiple seizures of the same film in violation of *Heller* v. *New York, supra,* and by later failing to present the felony cases to the grand jury for indictment when the court's restraining orders clearly permitted such action. Nevertheless, the court mistakenly dismissed the case and the two others upon which it rendered decisions

on the merits.[13] The court's written opinion and order was unaccompanied by a judgment.

On August 14, 1975, appellant Butler moved for relief from the court's opinion and order, pointing out as well the obvious inconsistency between the grant of a permanent injunction and dismissal of the case.

In order to perfect an appeal, appellant Butler also moved for entry of a separate judgment[14] on August 21, 1975.

No orders were entered on either of the foregoing motions, although the court, as of August 29, 1975, withdrew its dismissal of the cases and directed counsel for each plaintiff who received a decision on the merits to prepare a form of judgment.

On August 25, 1975, appellants filed notice of appeal to this Court from the July 3, 1975, opinion and order of the three-judge court.

An application for suspension of the three-judge court's permanent injunction was filed on September 4, 1975.

On September 10, 1975, appellants filed a second notice of appeal from the opinion and order of the three-judge court as the same had been amended on August 29, 1975.

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13. The remainder of the consolidated cases were remanded to the districts from which they came with directions to each single district judge to hold a hearing on the question of bad faith and harassment or other special circumstances to determine whether the remanded case falls outside *Younger* v. *Harris, supra,* or *Huffman* v. *Pursue, Ltd.*, ___ U.S. ___, 95 S.Ct. 1200, ___ L.Ed.2d ___ (1975). If no bad faith or harassment or special circumstances are found, the single district judge is to dismiss the case. In the event bad faith or harassment or special circumstances are found, the case is to be returned to the Southern District of Texas for disposition by the three-judge court.

14. Rule 58, Federal Rules of Civil Procedure, provides that ". . . the court shall promptly approve the form of judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. . . ."

On September 26, 1975, appellants moved to vacate the decision of the three-judge court on jurisdictional grounds and requested a remand of the case to the Western District of Texas. In the alternative they requested immediate entry of judgment.

Appellants next filed a written request on October 3, 1975, that the court enter its ruling on their application for suspension of the permanent injunction pending appeal.

Because a judgment had not yet been entered by the court, appellants filed a second motion for entry of judgment on October 9, 1975.

On October 17, 1975 appellants filed a third motion for entry of judgment. To date, no rulings have been received on these latter motions nor has judgment been entered by the court.

THE QUESTIONS ARE SUBSTANTIAL

1. The District Judge for the Western District of Texas, to whom application for injunction was made, was not designated a member of the three-judge panel, though 28 U.S.C. § 2284(1) requires that "[t]he district judge to whom the application for injunction or other relief is presented shall constitute one member of such court." The panel which ultimately heard this case had previously been convened to consider a pending obscenity matter originating in the Southern District of Texas. Because the Chief Circuit Judge failed to designate the originating judge in the Western District of Texas a member of the panel, the assignment of this action to an already constituted panel in another district does not accord with the mandatory language of the statute.

Appellants were notified after the fact that a three-judge panel had been requested and the case transferred to the Southern District of Texas. Appellants thereupon filed their answer objecting to the jurisdiction of that three-judge panel and moved that the "Court find that it has not acquired jurisdiction under the statutes cited in Plaintiff's Complaint," and that the court accordingly dismiss the action. Ultimately, cases from four federal districts involving a diverse range of issues were transferred to the three-judge panel in Houston. Because the statute requires that one member of the panel be a circuit judge and one member the originating district judge, it is clear that a consideration of cases from more than two districts would violate the terms of the statute.

Mr. Chief Justice Burger, concurring in *Hicks* v. *Miranda*, ... U.S. ....., 95 S.Ct. 2281, 2293, ... L.Ed.2d ..... (1975), pointed out that

> "[u]nder 28 U.S.C. § 2284 (1) the District Judge to whom the application for relief is presented, and who notifies the Chief Judge of the need to convene the three-judge court, 'shall constitute one member of such court.' It is well settled that 'shall' means 'must,' cf. Merced Rosa v. Herrero, 423 F.2d 591, 593 N.2 (CA1 1970), yet the judge who called for the three-judge court here was not named to the panel."

The language of the three-judge court statutes is technical in nature and should be construed strictly when applying the statutes. *Phillips* v. *United States*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941); *Swift* v. *Wickham*, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965). For failure to abide by the requirements of 28 U.S.C. § 2284(1), the judgment of the three-judge panel should be vacated and the cause remanded to the originating judge for a hearing

to determine whether the case merits the convening of a three-judge court.

2. The managing judge of the three-judge panel issued successive TRO's against appellants which continued in effect from July 29, 1974, to July 3, 1975, when a permanent injunction was entered. In all instances, the TRO's were granted ex parte and without notice or hearing and without the concurrence of any other judge on the panel. Appellants on three occasions demanded dissolution of the successive TRO's or a hearing on the issuance of a temporary injunction, but no action was taken by the court on appellants' motions.

By granting successive TRO's of such duration as occurred in the instant case, the managing judge abused his discretion under Rule 65(b), Federal Rules of Civil Procedure, and 28 U.S.C. § 2284(3).

A TRO cannot be of a duration longer than twenty (20) days, and any greater length of time effectually makes the order a temporary injunction requiring notice and hearing. *Granny Goose Foods, Inc.* v. *Brotherhood of Transfers*, 415 U.S. 423, 94 S.Ct. 1113, ... L.Ed.2d ..... (1974); *Sampson* v. *Murray*, 415 U.S. 61, 94 S.Ct. 937, ... L.Ed.2d ..... (1974); *Weintraub* v. *Hanrahan*, 435 F.2d 461 (7th Cir. 1970). See 11 Wright & Miller, Federal Practice and Procedure, § 2959, p. 580 (1970). Since the multitudinous TRO's were of such duration as to effectually be a temporary injunction, the managing judge of the three-judge court abused his discretion by not granting a hearing and by failing to obtain the concurrence of another member of the panel as required under 28 U.S.C. § 2284(4). Further, 28 U.S.C. § 2284(3) mandates that the TRO

> ". . . contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted."

No evidence was presented to the managing judge by appellee and his numerous TRO's made reference to none.

Because of the numerous and coercive TRO's which enjoined appellants from arresting appellee, appellants were thus precluded from proceeding to the grand jury on the felony criminal instruments complaints. Had indictments been returned by the grand jury, the State district court would have immediately issued a capias for the arrest of appellee, and appellants would have automatically been in violation of the TRO's issued by the managing judge. Moreover, since appellee made his calculated departure from Texas and refused to voluntarily return until the film "Deep Throat" had completed its run at the Fiesta Theater, appellants could not secure his presence at a trial of the felony cases by summons but only through arrest and extradition—again a violation of the TRO's. Yet the three-judge court in its opinion accused appellants of bad faith for failing to present those cases to the grand jury. Thus, appellants now stand charged by the court with bad faith simply because they attempted, in good faith, to adhere strictly to the court's own orders.

3. The three-judge court held that once an adversary hearing is conducted by a magistrate and a film seized, no further seizures can be made under *Heller* v. *New York, supra*, until there has been a final adjudication of the obscenity issue on the merits. Appellants believe that the court's interpretation of *Heller* is incorrect. Appellants submit that a motion picture exhibitor is not protected by this Court's language in *Heller*, from later seizures when those seizures are made to preserve films as evidence

of separate offenses, each seizure is preceded by a judicial determination of the film's obscenity by a neutral magistrate at an adversary proceeding, and any subsequent delays in obtaining a prompt, final determination of the film's obscenity is occasioned solely by the motion picture exhibitor himself.

An application of the *Heller* doctrine in the manner applied by the court below effectively precludes State law enforcement officials from arresting violators of the State obscenity statutes for so long as the theater operator can delay a final determination of the obscenity issue on the merits.

The events in the instant case demonstrate vividly the paralyzing position law enforcement is placed in when subsequent seizures are prohibited until after there is a final jury determination on the originally seized film. After obtaining a TRO in federal court against further seizures of "Deep Throat," appellee purposefully absented himself from the State in order to prevent a final jury determination in State court on the issue of obscenity until after the film had completed its run. The three-judge court's application of *Heller* places law enforcement in a "Catch-22" situation whereby after the first seizure of the film "Deep Throat" or any other motion picture, the exhibitor may continue to show the film so long as he can delay a final adjudication on the merits. Appellants are confident that this Court did not intend to place law enforcement officials in such a position as to allow the bad-faith delays of the exhibitor to serve as a shield from enforcement of State penal laws.

When all delays are occasioned by the exhibitor, *Heller* appears to afford that exhibitor no sanctuary. In addressing the point, *Heller* states:

> "Petitioner made no pretrial motions seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue so it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if petitioner had desired. Although we have refrained from establishing rigid, specific time deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of 'promptness' those delays caused by the choice of the defendant. See United States v. Thirty-Seven Photographs, *supra*, 402 U.S., at 373-374, 91 S.Ct., at 1406-1407 (1971). In this case, the barrier to a prompt judicial determination of the obscenity issue in an adversary proceeding was not the State, but petitioner's decision to waive pretrial motions and reserve the obscenity issue for trial. Cf. Kingsley Books, Inc. v. Brown, *supra*, 354 U.S., at 439, 77 S.Ct., at 1326 (1957)." *Id.*, at 413 U.S. 490, 93 S.Ct. 2794.

This Court's conclusion that there must be "a prompt judicial determination of the obscenity issue in an adversary proceeding" has been interpreted by the court below to mean that there must be a final trial on the merits before any subsequent seizures are made and that the adversary hearings conducted in this case did not effectively protect appellee's First Amendment rights pending a trial on the merits. Yet neither the court nor appellee ever contested:

> ". . . that the judge was a 'neutral detached magistrate,' that he had a full opportunity for independent judicial determination of probable cause prior to issuing the warrant, and that he was able to 'focus searchingly on the question of obscenity.'" *Id.*, at 413 U.S. 488, 93 S. Ct. 2793.

The propriety of protecting First Amendment rights through adversary hearings was dealt with by the Second Circuit in *G. I. Distributors* v. *Murphy*, 469 F.2d 752, at 757 (2d Cir. 1972), *remanded* 413 U.S. 913, 93 S.Ct. 3056, 37 L.Ed.2d 1033 (1973). That Court held the seizure of 19,000 magazines (most of which were identical) to be valid because an adversary determination had been made by a magistrate that the material was obscene. The court declined to order the return of any duplicates of the material since there had been an adversary hearing. The *Murphy* decision cites *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (2d Cir. 1970), for the proposition that:

> "'if the State wishes to interfere *substantially* with distribution of films or books, it must first provide . . . an adversary hearing.' *Astro Cinema, supra*, 422 F.2d at 296 (emphasis added). However, when we were presented with a minor and insubstantial prior restraint involving the seizure of a few samples of allegedly obscene materials for evidentiary purposes, we did not hesitate to permit the seizure without a prior hearing. See U.S. v. Wild, 422 F.2d 34 (2d Cir. 1969), reh. denied (2d Cir. 1970), cert. denied, 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152 (1971)." *Murphy, supra* at 757.

The second *G.I. Distributors, Inc.* v. *Murphy* decision found at 490 F.2d 1167 (2d Cir. 1973), *cert. denied* 416 U.S. 939, 94 S.Ct. 1941 (1974), held the adversary hearings before a neutral magistrate sufficient to comply with the *Heller* requirement that there be a "prompt judicial determination of the obscenity issue in an adversary proceeding" before multiple seizures can be made of the same film.

In *West* v. *State*, 489 S.W.2d 597, at 602 (Tex. Crim. App. 1973), *remanded* 414 U.S. 961, 94 S.Ct. 268, 38 L.Ed.2d

209 (1973), for determination in light of *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the Texas Court of Criminal Appeals held:

> "The term 'adversary hearing' has no magical meaning which connotes only a proceeding in a courthouse with robed judges presiding. All the term does require is that an exhibitor or speaker have a fair opportunity to present reasons why a seizure should not take place. See, Braha v. Texas, supra; Star-Satellite, Inc. v. Rosetti, 317 F. Supp. 1339 (S.D. Miss. 1970); Cambist Films, Inc. v. Illinois, 292 F.Supp. 185 (N.D. Ill. 1968). See also, Lee Art Theater, Inc. v. Virginia, supra at fn. 11. Under the facts presented in the case at bar, we find that a constitutionally sufficient adversary hearing was held prior to the seizure of the film. Appellant was afforded his right to counsel, and counsel for appellant was afforded an opportunity to direct the magistrate's attention to the proper legal principles to be applied. The procedure utilized in the instant case did not in any way interfere with the exhibition of the film until after the magistrate had found, on the basis of the evidence before him, probable cause to believe that the film was obscene. The record reflects that the purposes for an adversary hearing were met by the proceedings conducted in the instant case. Moreover, the fact that the magistrate and the state went beyond mere compliance with the procedure required by the statute then in force demonstrates their good faith effort to protect the First Amendment rights involved. The trial court properly overruled appellant's motion to suppress."

The instant case and the above cited cases differ significantly from *Bradford* v. *Wade*, 376 F. Supp. 45 (N.D.

Tex. 1974), cited by the court below, because in *Bradford* there were no adversay hearings prior to the subsequent seizures. The seizures were not based on any judicial determinations but were mere police seizures; therefore, *Bradford* is completely inapplicable. The three-judge court, however, applies the *Bradford* decision to a completely inappropriate set of facts and thereby makes the erroneous conclusion that *Heller* requires a final jury determination on the issue of obscenity before any subsequent seizure of the film may be made despite the fact that there has been a judicial determination by a neutral magistrate prior to each seizure and arrest and a prompt trial on the merits was available on request. An examination of those cases applying the *Heller* doctrine indicates that the court below stands alone in its interpretation of that doctrine.

In *Inland Empire Enterprises, Inc.* v. *Morton*, 365 F. Supp. 1014 (C.D. Cal. 1973), the court held at p. 1017:

> "After each seizure of the film, the Plaintiff purchased a new print and attempted again to exhibit the film. The Defendants, acting in good faith to protect the community, believed correctly and constitutionally that each such new showing of a newly purchased copy of the film 'Deep Throat' was a separate and distinct violation of the law. This Court concurs in that determination. Just as a new offense subject to arrest and seizure on a valid warrant is committed every day when a putative Defendant purchases other kinds of contraband such as heroin, cocaine or other narcotics, and then possesses, distributes and sells them, so also here when the Plaintiff each new day purchases a new copy of the film 'Deep Throat' determined by the Honorable Municipal Court Judges John Barnard and Gerald F. Shulte in their arrest and search warrants to be obscene, at least on probable cause, and then exhibits the same, he is subject to arrest and the film to seizure. Both sets of crimes are crimes, and there can be no gainsaying or quibbling about that. Since each such showing of each new film was and is a new and separate violation, this case is distinguished from the fact situation in Veen v. Davis, *supra,* and Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (decided June 25, 1973). The films were properly seized each time pursuant to search warrants issued by a Judge in connection with the proposed prosecution of those charged with its exhibition."

In accord with *Inland Empire Enterprises, Inc.* v. *Morton*, *supra*, the Superior Court for the District of Columbia held in *United States* v. *One Complete Copy of Movie Film "Deep Throat,"* D.C. No. 134-75 (February 6, 1975), cited at 16 Cr.L. Reptr. 2461, opinion attached as Appendix F:

> "The controlling question is whether the exhibitor is correct in his contention that he is entitled to a jury verdict on the issue of obscenity before the showing of the film may effectively be enjoined or whether, on the other hand, the requirement that there be no restraint upon a showing of the film prior to a judicial determination of obscenity is satisfied by a determination of the type which this Court has just reached on the basis of the adversary hearing.
>
> "In deciding this issue, the Court is cognizant of the legitimate interest of the State and the preservation of public morals against corrupting influences. *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1973). On the other hand, the danger of abridging constitutional rights, including those guaranteed by the First

Amendment, is one to which we must be continuously alert. In the case at bar, it is necessary to be especially sensitive to the fact that if the government is correct in asserting that it should be authorized to seize a copy of 'Deep Throat' now being shown, the Government will also be entitled to seize any further copies of the film which the exhibitor may have obtained and thereby preclude further exhibition of the film pending trial on the merits.

> "*An exhaustive review of the relevant decisions of the Supreme Court leads to the conclusion that once a full adversary hearing has been held and both sides have been afforded the opportunity to be heard on the issue of obscenity the requirements of the Constitution have been satisfied and a court may authorize seizure of materials deemed obscene not only for use as evidence but also pursuant to D.C. Code 1973, § 23-521, as property which is 'illegally possessed' or 'to be used to commit . . . a criminal offense.' Quantities of Copies of Books* v. *Kansas,* 378 U.S. 205 (1964); *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957). This conclusion is entirely consistent with *Heller,* supra." (emphasis ours)

The interpretation of *Heller* made by the court below is completely at variance with those other cases interpreting *Heller*; therefore, this Court is requested to guide the lower courts in correcting that variance on a substantial point of law and appellants so pray.

4. The three-judge court has ruled that four separate seizures of the same film "Deep Throat" constituted bad faith and harassment by appellants, despite the fact that an adversary hearing was conducted by a neutral magistrate prior to each seizure. The court, however, never challenged the propriety of the magistrate's determination

and the right of the prosecuting officials to rely on the magistrate's orders. In each instance appellants acted upon the direction of the magistrate who conducted the hearing and ordered the arrests and seizures of the film and projector. In *Hicks* v. *Miranda,* ..... U.S. ....., 95 S.Ct. 2281 at 2293, ... L.Ed.2d ..... (1975), this Court held:

> "Absent at least some effort by the District Court to impeach the entitlement of the prosecuting officials to rely on repeated judicial authorization for their conduct, we cannot agree that bad faith and harassment were made out."

The decision in *Hicks* v. *Miranda, supra,* which the lower court ignored in its opinion, appears to find that four separate seizures of "Deep Throat" prior to which adversary hearings were conducted and warrants issued by a neutral magistrate, do not constitute "official harassment and bad faith." Nor can bad faith be inferred merely because the District Court disagrees with the statutory construction of the Texas Criminal Instruments Statute, Vernon's Tex. Penal Code, § 16.01; "[o]therwise, bad faith and harassment would be present in every case in which a state statute is ruled unconstitutional [on its face or as applied], and the rule of Younger v. Harris would be swallowed up by its exception." *Hicks* v. *Miranda, supra* at 95 S.Ct. 2293.

The District Court, in failing to acknowledge the language of *Hicks* v. *Miranda, supra,* erred in concluding that the four separate seizures of "Deep Throat" constituted bad faith harassment by appellants, and the District Court also erred in concluding that the application of a yet uninterpreted State statute was bad faith harassment.

5. The three-judge decision treats the requirements of *Younger* v. *Harris, supra,* and *Perez* v. *Ledesma, supra,*

as a troublesome obstacle which it must overcome rather than as a guidepost to its treatment of cases in which injunctive relief is sought. In its attempt to rid itself of the troublesome *Younger* doctrine, the court exercised some unique judicial gymnastics which it now contends did not injure the State's right to bring its criminal cases to trial. Not only do that court's multitudinous TRO's demonstrate facially that the State could not bring the cases to trial, but hidden beneath those TRO's is the inhibiting effect that the court's actions and words had on lawful State prosecution. More specifically, the managing judge's tacit acceptance of jurisdiction on August 12, 1974, his denial of appellants' request for any type of evidentiary hearing on their motions for dissolution of the TRO's as well as his early indication that he would inevitably declare the Criminal Instruments Statute unconstitutional, was sufficient to "chill" any action by the State courts and appellants until the issue had been resolved. Appellants faced the dilemma of proceeding with criminal cases pursuant to a statute which the court indicated it would declare unconstitutional simply to show their lack of bad faith harassment or otherwise proceeding with criminal prosecutions which could ultimately invoke against them the contempt powers of the court. By injecting itself into issues pending in lawful State court proceedings, the managing judge caused appellants and State judges to become so apprehensive of proceeding further in criminal actions that they felt compelled to refrain from going forward until there was a resolution of the instant case. The three-judge court has therefore done indirectly what *Younger* had precluded it from doing directly. Appellants believe that *Younger* does not sanction such federal interference with pending State criminal matters whether that interference be through covert intimidation or by federal injunction.

Appellee never sought any of the remedies available in State court. Rather, he has thus far, with the aid of the federal court, frustrated and paralyzed the just processes of the State. Instead of requesting an examining trial, motion to suppress, motion for return of the seized property, or request for a second adversary hearing in the State court, appellee chose instead to forum-shop in the federal courts. *Heller* v. *New York, supra,* makes clear that the federal court should not offer assistance to a person who deliberately refuses to avail himself of State court remedies. As stated in 30 C.J.S., *Equity,* § 26, p. 833:

> "Equity will not take jurisdiction if there is available a single remedy at law sufficient for plaintiff's protection, or several remedies which are together sufficient."

This Court applied the above rule in *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.,* 415 U.S. 1, 94 S.Ct. 1028, 1040, 39 L.Ed.2d 123 (1974). The Court held that where there is provided a judicial remedy at law, that remedy is exclusive of equitable relief via injunction. The Court went on to hold that:

> "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."

The Court of Appeals for the Fifth Circuit has made it clear that a party may not seek equitable relief in federal court when he has not yet availed himself of his State legal remedies. In *United States* v. *Navarro,* 429 F.2d 928, 931 (5th Cir. 1970) the Court stated:

> "It is elementary that a court of equity should not act where there is an adequate remedy at law. *Mapp* offers a state legal remedy to defendants in State

criminal proceedings where the state attempts to use the fruits of an unconstitutional search whether gathered by State or federal officers. *Mapp* requires the exclusion of such evidence by the State Court, and a failure to do so is a violation of due process of law reviewable by state appellate courts and the Supreme Court. Thus, *Mapp* obviates the necessity for an injunction by a federal court to protect a prior federal suppression order where the evidence in question was the product of an unconstitutional search."

This Court in *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163, 63 S.Ct. 877, 881, 87 L.Ed. 1324 (1943), stated that:

"It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for injunction. Davis & Farnum Mfg. Co. v. City of Los Angeles, 189 U.S. 207, 23 S.Ct. 498, 47 L.Ed. 778; Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927. *Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and applications, subject only to review by this Court on federal grounds appropriately asserted.* Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are, to be supported only on a showing of danger of irreparable injury 'both great and immediate.' Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95, 55 S.Ct. 678, 680, 79 L. Ed. 1322, and cases cited; Beal v. Missouri Pac. R.R. Corp., 312 U.S. 45, 49, 61 S. Ct. 418, 420, 85 L. Ed. 577; and cases cited; Watson v. Buck, 313 U.S. 387, 61 S. Ct. 962, 85 L.Ed. 1416; Williams v. Miller, 317 U.S. 599, 63 S.Ct. 258, 87 L.Ed.—" (emphasis ours)

In this case, appellee has merely attempted to bypass adequate State court remedies in his forum-shopping effort, and federal courts may not enjoin pending State obscenity prosecutions where the litigant has intentionally bypassed available remedies in State courts which have appropriate safeguards. *Mitchum* v. *McAuley*, 311 F. Supp. 479 (N.D. Fla. 1970).

In regard to the injection of the federal courts into the just processes of the State courts, the Honorable John H. Wood, in the companion case of *Southland Theatres* v. *Butler*, No. SA-73-CA-214, judiciously inquired at p. 17 of the transcript in that cause:

"What makes this Court so much more omnipotent or the Federal Court so much wiser, or how is this Court to be held or felt to be a greater administrator of true justice than a State Trial Judge?"

To which the attorney for plaintiff responded that he was choosing the federal court as his forum rather than the State courts where the criminal prosecution was pending.[15] The same inquiry might be made in this case where appellee has chosen to ignore his remedies in the State courts where the criminal prosecution is pending and instead go forum-shopping in the federal courts.

This Court in *Younger* v. *Harris, supra*; *Perez* v. *Ledesma, supra*; *Samuels* v. *Mackell*, 401 U.S. 66, 91 S.Ct.

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15. Compare *Hicks* v. *Miranda, supra*, at 95 S.Ct. 2285, f.n. 3.

764, 27 L.Ed.2d 688 (1971); *Boyle* v. *Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); *Dyson* v. *Stein*, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971); and *Byrne* v. *Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971), has established the principle that:

> "Only in cases of proven harassment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal relief against pendi[illegible] State prosecutions appropriate." *Perez, supra* at 401 U.S. 86, 91 S.Ct. 677.

Appellee did not allege in his complaint nor did he make any offer of proof that appellants acted in "bad faith" or that their tactics entered the realm of "harassment" or "extraordinary circumstances." The only allegation made by appellee insofar as meeting the requisites of *Younger* and *Perez* is that he will suffer "irreparable injury" if an injunction is not granted.[16]

In order for the court to sustain an allegation of irreparable injury under *Younger* and the other Supreme Court cases decided the same day, the injury must be "both great and immediate," and such types of injury as "cost, anxiety, and inconvenience" in defending a crim-

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16. Appellee, in his complaint at page 4, states:

> "By reason of the conduct of Defendant, on aforesaid, the rights of Plaintiff have been violated to his irreparable harm. Unless enjoined, Defendants will cause further imminent and irreparable harm to Plaintiff, for which there is no plain, adequate remedy at law in the courts of the State of Texas."

Appellee's list of alleged injuries may be found at page 4 of his complaint. He states that

> ". . . if the restraining order and injunction is not granted . . . Plaintiff will be forced, at a high cost, to close the theatre, pay bond premiums, attorneys fee and defend himself from continual arrests."

inal prosecution are *not* "irreparable" under the law. *Younger* v. *Harris, supra.*

The three-judge court circumvented *Younger* by use of a "back door" approach in first declaring the application of the Criminal Instruments Statute unconstitutional and then concluding that it was "bad faith" to apply the statute which was "manifestly inappropriate to the situation." If the court is allowed to determine the merits of a constitutional claim and then utilize that determination to make out a case of bad faith then the *Younger* doctrine will become a nullity. Further, the court concluded that "bad faith harassment" was shown by the four separate seizures of the film "Deep Throat;" however, *Hicks* v. *Miranda, supra*, lays that proposition to rest.

The District Court should not be allowed to shore up its bridge over the abstention doctrine by first deciding the constitutional claim before ever reaching the *Younger* issue.

Prior to the granting of any injunctive relief or the convening of any three-judge court, the plaintiff must demonstrate by clear and convincing evidence that there was "bad faith," "harassment" or irreparable injury. Absent such showing the federal court should not have arrested the judicial processes of the State courts even if the statutes attacked are unconstitutional or their application erroneous. *Younger* v. *Harris, supra*; *Douglas* v. *City of Jeannette, supra; Southland Theatres, Inc.* v. *Butler*, 364 F. Supp. 494 (W.D. Tex. 1973).

It is submitted that the District Court in its eagerness to declare a state action unconstitutional has evaded the requirements of *Younger* v. *Harris, supra*, and has from the inception of this action been intimidating to lawful State criminal processes by its lengthy restraints and its instantaneous conclusion that State officials had acted un-

constitutionally. Appellants believe such action by the District Court presents issues on appeal which are substantial and of major importance to the public and for protection of a federal system.

Respectfully submitted,

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October 23, 1975

CERTIFICATE OF SERVICE

I, Keith W. Burris, hereby certify that three (3) copies of this Jurisdictional Statement were mailed by United States Mail, postage prepaid, to Gerald Goldstein, attorney for appellee, 2900 Tower Life Building, San Antonio, Texas 78205, on this the 23rd day of October, 1975. I further certify that all parties required to be served have been served.

KEITH W. BURRIS
Assistant Criminal District Attorney
Bexar County, Texas
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San Antonio, Texas 78205

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 73-H-528

UNIVERSAL AMUSEMENT CO., INC., JOE SPIEGEL, JOHN W. COLES, JAMES OHMART, ERNEST GEILLE, JR., BONNIE MOORE, and EDNA BRASHEAR

v.

CAROL VANCE, HERMAN SHORT, CAPTAIN JAMES M. ALBRIGHT, TROY R. DRISKELL, and JUDGE I. D. McMASTER

(Filed July 3, 1975)

Before INGRAHAM, Circuit Judge, and
SINGLETON and TAYLOR, District Judges.

SINGLETON, District Judge:

I. *Introduction*

This case comes before this three-judge court in a unique posture. The original case, *Universal Amusements v. Vance*, the captioned case, was brought in the Southern District of Texas, Houston Division, and concerned the impending trial of a motion picture theater operator who had shown the film "Deep Throat." Plaintiffs in that case challenged the constitutionality of article 527 of the Texas Penal Code which at that time constituted the statutory law in Texas on obscenity. The plaintiffs sought, among

other remedies, injunctive relief to enjoin the pending criminal prosecution. This three-judge court was constituted as a result of that case.

At approximately the same time as the Houston prosecutions were being instituted and carried out, a motion picture theater operator in Dallas, Texas, was being prosecuted for also showing "Deep Throat." This prosecution was under the same statute. Chief Judge John R. Brown consolidated these two "Deep Throat" cases.

In May of 1973 a hearing on a preliminary injunction was heard by a three-judge court and denied. The cases were then continued. Over the next two years, many changes in the posture of these cases occurred. The Houston state court prosecution for the showing of the motion picture "Deep Throat" was twice tried. Each time the trial ended in a mistrial because the jury was unable to agree on a verdict. More importantly, however, the prosecution for alleged obscenity-connected activities mushroomed all over the state of Texas. Each time a defendant would seek to have his obscenity prosecution enjoined in a federal court in Texas, Chief Judge John R. Brown would consolidate such case with the instant three-judge case. A full list of all of the cases can be found in an appendix to this opinion.

On August 12 the managing judge of this three-judge court, Honorable John V. Singleton, held a pretrial conference at which attorneys representing all of the parties in each of the cases then consolidated appeared.

The cases, as they were consolidated into the original case, presented a variety of challenges to Texas statutes. Not only was the constitutionality of the substantive obscenity statutes challenged but also the use of statutes allegedly designed for purposes other than the closing down

of purported commercial obscenity was challenged, as were the old and new public nuisance statutes used to abate the alleged public nuisance of commercial obscenity. Finally, the law on obscenity had changed. In June of 1973, the Supreme Court decided the Miller quintet.[1] Shortly thereafter, two more important cases in the obscenity field were decided: *Heller* v. *New York*, 413 U.S. 483, 37 L.Ed.2d 745 (1973) and *Roaden* v. *Kentucky*, 413 U.S. 496, 37 L.Ed.2d 757 (1973). These cases dealt not with substantive obscenity laws but with the procedures to be used to bring into court those who are alleged purveyors of obscenity. The Texas obscenity laws, too, had changed. On January 1, 1974, the old article 527 was repealed, and in its place section 43.21 et seq. of the new penal code was enacted. The Texas nuisance statutes, also, were changed to specifically provide for the enjoining of the use of a premises for purposes of commercial obscenity.

In an effort to simplify the process of deciding all of these varied cases, the managing judge chose three of the cases which presented the least jurisdictional problems and also presented straightforwardly at least one of the challenges brought on by each of the remaining cases.

On November 15, 1974, the three-judge court again convened to hear oral arguments in each of the three cases. Each of the three sets of parties had earlier submitted a joint Pretrial Order, in which material and important facts had been stipulated and briefs on the points of law involved. Two of the cases have remaining factual disputes,

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1. The so-called *Miller* quintet consists of five companion cases handed down on June 21, 1973: *Miller* v. *California*, 413 U.S. 15, 37 L.Ed.2d 419 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 37 L.Ed.2d 446 (1973); *Kaplan* v. *California*, 413 U.S. 115, 37 L.Ed.2d 492 (1973); *United States* v. *12 200-Ft. Reels*, 413 U.S. 123, 37 L.Ed.2d 500 (1973); and *United States* v. *Orito*, 413 U.S. 139, 37 L.Ed.2d 513 (1973).

but these are immaterial to the determination of these cases.

II. *King Arts Theatre* v. *McCrea, CA-6-345*

The *King Arts* case comes out of San Angelo, Tom Green County, Texas. The plaintiffs are challenging the facial constitutionality of article 4667 of Vernon's Annotated Civil Statutes which provides for the abatement of public nuisances and, specifically, the inclusion, as a nuisance, of premises for purposes of commercial obscenity. The facts, as agreed to by the parties are as follows. King Arts Theatre, Inc., was operating an adults-only, enclosed motion picture theater in San Angelo, Texas. The theater showed sexually explicit films. On October 30, 1973, the landlord from whom the theater building was rented notified King Arts Theatre, Inc., that, at the suggestion of George E. McCrea, the county attorney of San Angelo, he was terminating the lease of the building as of November 15, 1973. The notice further informed the plaintiff that McCrea had contacted the landlord and told him that he intended to bring an application for an injunction to abate the theater as a public nuisance in order to prohibit the future showing of allegedly pornographic motion pictures.

Plaintiff filed suit on November 12, 1973, requesting a declaratory judgment and injunctive relief. By agreement all parties have determined that the *status quo* will be maintained until the determination of this case.

The country attorney still intends to seek an injunction based on the nuisance statute and to pursue his intention to cancel the lease of the premises.

The initial hurdle which has faced this court since the inception of these suits does not face us in this suit. That is the *Younger* v. *Harris,* 401 U.S. 37 (1971), hurdle.

In the instant case there is no pending criminal or civil prosecution because the county attorney determined that he should wait until the three-judge court had determined the issues before pursuing his intentions. Although the parties could not confer upon the court by agreement jurisdiction where it was lacking, the actions of the county attorney in failing to actively pursue his threatened course of action would certainly lessen the court's considerations of equity, comity, and federalism upon which *Younger* is based. At the same time, however, the existence of the threat of a real prosecution under the nuisance statute is enough to present an actual controversy as required by Article III of the Constitution. *Steffel* v. *Thompson,* 415 U.S. 452 (1974). One further question must be answered before we move to the merits of this case. The plaintiff moves for an injunction to prevent the state from utilizing the nuisance statute against it. A traditional prerequisite to injunctive relief, however, has been irreparable injury. This is true whether the injunction seeks to stop the activities of private citizens or the activities of the state, whether criminal or civil. *Steffel* v. *Thompson, supra,* has suggested that the question of whether or not injunctive relief can be granted in a threatened but not yet pending criminal case brought by the state may depend upon the status of the alleged criminal activity:

> We note that, in those cases where injunctive relief has been sought to restrain an imminent, but not yet pending, prosecution *for past conduct,* sufficient injury has not been found to warrant injunctive relief, see *Beal* v. *Missouri P.R. Corp.,* 312 U.S. 45 (1941); *Spielman Motor Sales Co., Inc.* v. *Dodge,* 295 U.S. 89 (1935); *Fenner* v. *Boykin,* 271 U.S. 240 (1926). There is some question, however, whether a showing of irreparable injury might be made in a case where, although no prosecution is pending or impending, an

> individual demonstrates that he will be required to *forego* constitutionally protected activity in order to avoid arrest. Compare *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Hygrade Provision Co., Inc.* v. *Sherman*, 266 U.S. 497 (1925); and *Terrace* v. *Thompson*, 263 U.S. 197, 214, 216 (1923), with *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943) . . . .

415 U.S. at 463, n. 12.

In the instant suit the plaintiff is being threatened with the use of a Civil statute, although it would be used by the district attorney, and in a real sense the plaintiff would be "prosecuted" by the state.[2] Although it might be termed quasi-criminal in nature, the statute in question does not provide for the incidents of a true criminal statute such as arrest or the posting of a bond. The inconveniences a prosecution of the nuisance statute would bring would not rise to the level of irreparable injury, at least on the facts presented in the instant case. For that reason, the court will confine itself to the question of a declaratory judgment.

The merits of the *King Arts* case present two questions for decision because of the structure of the Texas obscenity laws themselves. As originally threatened by the county attorney of Tom Green County, the nuisance statute, article 4667 of Vernons Annotated Civil Statutes, provided for the enjoining of "the habitual use, actual, threatened, or contemplated, of any premises, place, or building, or any part . . . [f]or keeping, being interested in, aiding or abetting the keeping of a bawdy or disorderly house as those terms are defined in the Penal Code."

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2. It is interesting to note that the Supreme Court has very recently held that a similar Ohio statute was more akin to a criminal prosecution than are most civil cases. *Huffman* v. *Pursue, Ltd.*, ... U.S. ....., 43 L.W. 4379 (March 18, 1975).

Article 513 of the old Texas Penal Code defined a "disorderly house" in section 2(a) as "any house, building, theater or other structure where obscene motion pictures are displayed, exhibited or shown to persons under twenty-one years of age." Section 2(c) and 2(d) of the statute defined "obscene motion picture" and "prurient interest" in the *Roth-Memoirs*[3] language virtually identical to that of the old penal code obscenity statute, article 527. The only material difference is that article 513 adds a sentence defining "contemporary community standards." The King Arts Theatre, Inc., was originally threatened with the use of these statutes.

After January 1, 1974, both the nuisance laws and the obscenity laws of Texas were changed. Article 527, "Obscene Articles" and article 513, "Disorderly House" were repealed by the enactment of the new penal code and article 4667 of the Texas Civil Statutes was rewritten. The new article 4667, "Injunctions to abate public nuisances" provides for the enjoining of the "habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof . . . (d) [f]or the commercial manufacturing, commercial distribution, or commercial exhibition of obscene materials . . . ."

Although one is not directed to the definition of obscenity by the statute itself, the logical place to find the state's definition of obscenity would be in the new Penal Code, § 43.21, which defines obscenity in virtually the same terms as the old article 527.

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3. *Roth* v. *United States*, 354 U.S. 476, 1 L.Ed.2d 1498 (1957), and *Memoirs* v. *Massachusetts*, 383 U.S. 413, 16 L.Ed.2d 1 (1966), are two Supreme Court cases which set out tests and definitions of obscenity. Their language forms the basis of almost all state statutory law governing obscenity, including both the old and new Texas statutes. Their language has been supplanted by the *Miller* quintet.

The plaintiffs have challenged the nuisance statute because its use necessarily refers one to the Penal Code § 27.53 definition of "obscene." This definition is challenged for the reasons that (1) the definition of obscenity is too vague and indefinite; (2) the statute as it is written or as it is construed is unconstitutional because it does not specifically define the sexual conduct prohibited, it does not give fair notice, and it is overbroad.

In a lengthy and exhaustive opinion, *West* v. *State of Texas* (No. 45,090), decided October 9, 1974, the Texas Court of Criminal Appeals addressed the question of the constitutionality of the article 527 definition of obscenity. In the *West* case the appellant had been convicted in June of 1971 of exhibiting obscene matter under article 527. The conviction was affirmed in 1972. 489 S.W.2d 597 (Tex. Cr.App. 1972). A writ of certiorari was granted by the United States Supreme Court, the judgment of the Texas Court of Criminal Appeals was vacated, and the case was remanded for further consideration by the Court of Criminal Appeals, in light of the Supreme Court's *Miller* quintet on October 23, 1973. *West* v. *Texas,* 414 U.S. 961. On February 13, 1974, the Court of Criminal Appeals again affirmed the conviction, but the court granted appellant's motion for leave to file a motion for rehearing. In the opinion denying appellant's motion for rehearing the Court of Criminal Appeals held that although article 527 was perhaps deficient on its face, it had been authoritatively construed by the courts of Texas, and these previous authoritative constructions of the statute supplied any constitutional deficiencies. *West* v. *State,* 514 S.W.2d 433 (Tex.Crim.App. 1974).

Article 527's definition of obscenity has been reenacted, effective January 1, 1974, in § 43.21 of the new Texas Penal Code. The "Practice Commentary" of the Code points

out that the language "sex, nudity, or excretion" replaces the old term "sexual matters" in article 527's definition of "obscene." Section 43.21 reads:

> Definitions.
>
> In this subchapter:
>
> (1) "Obscene" means having as a whole a dominant theme that:
>
> (A) appeals to a prurient interest in sex, nudity, or excretion;
>
> (B) is patently offensive because it affronts contemporary community standards relating to the description or representation of sex, nudity, or excretion; and
>
> (C) is utterly without redeeming social value.
>
> (2) "Material" means a book, magazine, newspaper, or other printed or written material; a picture, drawing, photograph, motion picture, or other pictorial representation; a statute or other figure; a recording, transcription, or mechanical, chemical, or electrical reproduction; or other article, equipment, or machine.
>
> (3) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion that goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.
>
> (4) "Distribute" means to transfer possession, whether with or without consideration.

(5) "Commercially distribute" means to transfer possession for valuable consideration.

The *West* opinion deals with a gloss on the "sexual matters" term, but this court believes that the Court of Criminal Appeals would apply that gloss to the substituted terms, "sex, nudity, or excretion."

Both article 527 and section 43.21 have taken their language from the definition found in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 16 L.Ed.2d 1 (1966), and *Roth* v. *United States*, 354 U.S. 476, 1 L.Ed.2d 1498 (1957). This definition differs from the new *Miller* definition in two ways. First, under *Miller* the state does not need to prove that the matter is utterly without redeeming social value. Proof of such a negative was felt by the Supreme Court to be a virtual impossibility and an unnecessary hindrance to the state's prosecutorial functions. In place of the "utterly without redeeming social value" postulate, the Supreme Court substituted the requirement that the state prove the matter lacking in "serious literary, artistic, political, or scientific value."

In the second place, the Supreme Court changed the standard to require the state's obscenity laws clearly and specifically define what is meant by obscene matters:

> We now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state laws, as written or authoritatively construed.

413 U.S. at 24. Further on in the opinion the Court indicates that these specific definitions are to be of "hard core" pornography only. 413 U.S. at 27.

Footnote 6 of the *Miller* opinion, 413 U.S. at 24, clearly indicates that the new *Miller* standard for obscenity is not intended to require the states except Oregon and Hawaii, whose definitions of specific sexual conduct are given as examples by the Court, to enact new obscenity laws. "Other existing state statutes, as construed heretofore or hereafter, may well be adequate."

This court must answer the question of whether or not the Texas statute can pass the *Miller* test on this issue. Whether referred to as "sexual matters," the term which concerned the Court of Criminal Appeals, or "sex, nudity, or excretion," which concerns this court, the defined sexual conduct the depiction of which is forbidden by the Texas statutes, old or new, is not sufficiently specific on its face to satisfy *Miller*. However, the construction of the statute by the Court of Criminal Appeals may well save the statute. The Court of Criminal Appeals so held in the *West* case.

In the *West* opinion, the Court of Criminal Appeals interpreted and restricted the term "sexual matters" used in the article 527 § 1 definition of obscenity to the examples the Supreme Court used in *Miller*:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

413 U.S. at 25.

Further, the Court of Criminal Appeals cited five cases handed down prior to the *Miller* case in which either the Court of Criminal Appeals or the Court of Civil Ap-

peals had construed the statute as forbidding conduct which would fit into the examples which the Supreme Court gave.[4]

The cases show that the courts of Texas have adhered rather closely to the ideas of the Supreme Court of what constitutes obscenity. Although it seems to this court that the obscenity laws, even the most specific, are by their natures vague,[5] we cannot hold in light of the *Miller* quintet's guidelines that the Texas statute, as construed, is impermissibly so.

In *Hamling* v. *United States*, ... U.S. ....., 41 L.Ed.2d 590 (1974), one of the more recent Supreme Court cases on the obscenity subject, the Court faced a challenge to the federal obscenity statute, 18 U.S.C. § 1461, which had repeatedly been held not unconstitutionally vague. The statute was again challenged on the grounds that now the statute was unconstitutionally vague because its language did not contain, nor had it been construed to apply, to the specific types of conduct set out in *Miller*. The Court held that that argument "fundamentally misconceives the thrust of our decision in the *Miller* case." The Court reiterated that the purpose of the *Miller* quintet was not to invalidate all existing statutes. "The *Miller* cases . . . were intended neither as legislative drafting handbooks nor as manuals of jury instructions." Since in *United States* v. *12 200-foot Reels of Film*, 413 U.S. 123 (1973), one of the *Miller* cases, the Court had clearly indicated that the federal statute would in the future be

4. *Phelps* v. *State*, 396 S.W.2d 396 (Tex.Crim.App. 1965), *Moore* v. *State*, 470 S.W.2d 391 (Tex.Civ.App.—San Antonio 1971), *Byers* v. *State*, 475 S.W.2d 935 (Tex.Crim.App. 1972), *Hunt* v. *State*, 475 S.W.2d 935 (Tex.Crim.App. 1972), and *Thacker* v. *State*, 490 S.W.2d 854 (Tex.Crim.App. 1973).

5. *Cf.* discussion in *Roth* v. *United States*, 345 U.S. 476, 491-492.

construed as dealing only with obscenity such as that described in *Miller*, and since it was also clear that the material found obscene in *Hamling* was well within the *Miller* limits, the Supreme Court found that 18 U.S.C. § 1461, on its face, as construed, or as applied to appellant Hamling was not void for vagueness.

A related argument in *Hamling* that the statute did not give appellant fair warning of the crime, in light of the new *Miller* standards, failed because the Court pointed out that *Miller* presented a "clarifying gloss" to a statute. It did not make criminal, conduct which was not previously thought to be criminal.

The plaintiff has not presented any other specific challenges to the vagueness and overbreadth of section 43.21 (formerly article 527), although he has challenged the statute generally for this reason. The statute tracks the language of the *Memoirs-Roth* cases as we have seen, and although *Miller* may have served to clarify that language to a greater extent, *Hamling* makes clear that *Miller* was never intended to invalidate that language completely. Of the two changes which *Miller* made on the *Memoirs-Roth* language, one would render the Texas statute now more stringent than is constitutionally necessary, and the other has now been authoritatively and definitely included in the statutory language through judicial construction by the highest criminal court in the state.

It is clear to this court, therefore, that as it would be incorporated by reference into the nuisance statute scheme, the Texas Penal Code definition of obscenity is not unconstitutionally vague, overbroad, or invalid because it fails to give adequate notice.

The plaintiffs have urged us to hold that the Texas definition as now construed by the Court of Criminal Ap-

peals cannot be used retroactively since the defendants would not have a clear notice of the new construction. The Court of Criminal Appeals rejected that argument in *West* v. *State*, but the Supreme Court in *Hamling* was not called upon to give a definite ruling since the conduct in *Hamling* so clearly fell within the *Miller* "examples." The posture of the instant case, in which there are no pending cases to say nothing of a criminal conviction, is such that this court, as much as it would prefer to dispose of all issues at one time, believes that it would be highly improper to rule on a point which is not yet ripe for adjudication.

In considering the plaintiff's second challenge to the public nuisance statute, article 4667, we must also consider its companion statutes, articles 4665 and 4666.

Article 4665, "Nuisance; evidence" provides:

> Proof that any of said prohibited acts are frequently committed in any of said places shall be prima facie evidence that the proprietor knowingly permitted the same, and evidence that persons have been convicted of committing any said act in a hotel, boarding house or rooming house, is admissible to show knowledge on the part of the defendants that this law is being violated in the house. The original papers and judgments or certified copies thereof in such cases of convictions may be used in evidence in the suit for injunction and oral evidence is admissible to show that the offense for which said parties were convicted was committed in said house. Evidence of general reputation of said houses shall also be admissible to prove the existence of said nuisance.

Article 4666, "Nuisance; prosecution," was not changed by the legislature when these other statutes were redrawn.

It is the only nuisance statute which can be used in the obscenity field because article 527 § 1 was repealed with the enactment of the new penal code. The statute provides that upon "reliable information" that a nuisance exists, the attorney general, the district attorney, or the county attorney shall bring suit in the name of the state to abate and enjoin the nuisance. If the state wins, the nuisance is abated and the defendants enjoined from maintaining it. The premises are to be closed for one year unless "the owner, tenant, or lessee" makes bond "in the penal sum of not less than $1,000 nor more than $5,000," with the condition that "the acts prohibited in this law shall not be done or permitted to be done in said house."

The plaintiffs have challenged the use of these Texas nuisance statutes against the operation of allegedly obscene motion picture theaters or bookstores because the statutes present a classic example of a prior restraint and because the procedural safeguards are inadequate to protect the dissemination of nonobscene materials which might be caught up with the obscene. Since nonobscene expression is entitled to first amendment protection, the threat which these statutes may present to the first amendment is of serious consideration.

The plaintiffs do not contend that the state cannot enjoin the showing of motion pictures which have been adjudicated obscene. Rather, the argument is that the statute is unconstitutional in providing that once a theater is declared a nuisance, it is to be shut down for one year unless a bond is posted. This prevents the showing of motion pictures that have not been determined obscene.

Although it is now clear that "obscenity is not within the area of constitutionally protected speech or press," *Roth* v. *United States*, 354 U.S. 476, 485, 1 L.Ed.2d 1498 (1957), it is equally as clear that the censor has the burden

of proving that a film is obscene. *Freedman* v. *Maryland*, 380 U.S. 51, 13 L.Ed.2d 649 (1965), *Southern Promotions, Ltd.* v. *Coward*, ... U.S. ....., 43 U.S.L.W. 4365 (March 18, 1975). To prove that a motion picture theater has been the scene of the showing of films that are obscene is not to prove that every film shown in that theater, in the past, present, or future, was, is, or will be obscene. By completely shutting down the operation of a motion picture theater, or by forcing the posting of a bond to keep the theater open, the state has imposed a prior restraint upon the showing of motion pictures. Motion pictures are protected by the free speech and free press guarantees of the first amendment, *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 20 L.Ed.2d 225 (1968), although they are not "necessarily subject to the precise rules governing any other particular method of expression." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503, 96 L.Ed. 1098, 1106 (1952). That this statute is clearly a prior restraint upon the showing of motion pictures cannot be disputed. *Cf. Near* v. *Minnesota*, 238 U.S. 697 (1930). ". . . [U]nder the Fourteenth Amendment, a state is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrant*, 367 U.S. 717, 731 (1961). Since "[a]ny system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity," *Bantum Books, Inc.* v. *Sullivan*, 376 U.S. 58, 70 (1963); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971), a statute which would impose such a prior restraint is to be "tolerated . . . only where it operate[s] under judicial superintendence and assure[s] an almost immediate judicial determination of the validity of the restraint." *Bantum Books*, 372 U.S. at 70. The statute in question, by providing for the closing down of the theater or posting bond has

not provided for a judicial determination of the obscenity of future motion pictures which may be shown in the theater.

In its defense the state has tried to distinguish the instant case from *Near* v. *Minnesota, supra*, but the attempt is not successful. In both cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain." *Bantum Books* v. *Sullivan*, 372 U.S. at 66. The separation of these forms of speech calls for "sensitive tools," *Speiser* v. *Randall*, 357 U.S. 513, 2 L.Ed.2d 1460 (1958), not the heavy hand of the public nuisance statute.

The state defends the statute by its assertion that the injunction which would abate the nuisance can be carefully drawn and highly descriptive of the kinds of films which are to be prohibited, citing the Texas Court of Civil Appeals case, *Richards* v. *State*, 497 S.W.2d 770 (Tex.Civ.App.—Beaumont, 1973), which dealt with an injunction outside the scope of article 4667. In that case the Texas court recognized that the injunction imposed a prior restraint, but upheld it because of "the specificity of the prohibiting order, the course of conduct of the defendants, and the fact that such forbidden future exhibitions would be of hard core pronography." With all respect to the Court of Civil Appeals sitting in Beaumont, this court disagrees with that court's disposition of the case.

In disagreeing with the Court of Civil Appeals, we fall back on the reasoning of *Near* v. *Minnesota*, 283 U.S. at 713 (1930):

> If we cut through mere details of procedure, the operation and effect of the statute in substance is that

> public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship.

In the instant case if we cut through the details of procedure the substance of the statute is that the public authorities may bring the owner or operator of a motion picture theater before a judge upon a charge of commercially manufacturing, distributing, or exhibiting obscene material. Once the state has proved that he has manufactured, distributed, or exhibited obscene materials, his theater is abated for one year unless he posts a bond of from $1,000 to $5,000. Unless the bond is posted, further showing of any motion picture is punishable by contempt of court. If the bond is posted then motion pictures may be shown, but should at any time the owner or operator step over that fine line between obscenity and nonobscenity, then the bond is forfeited. To this court, that is the essence of censorship.

As dissenting Justice Butler points out in *Near,* the newspapers which the Minnesota statute affected in *Near* were not ordinary newspapers criticizing the actions of public officials. These newspapers were engaged in harsh and malicious diatribes often employing racial ephithets and highly improbable statements. Justice Butler was concerned that the "distribution of scandalous matter is

detrimental to public morals and to the general welfare." 283 U.S. at 728. His dissent, if paraphrased, could make a logical and telling argument for the defense of the nuisance statute in the instant case. Yet, the majority of the Supreme Court held the first amendment more important.

In *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 437, 445 (1957), the Supreme Court explained its *Near* decision as striking down the state's attempt to "enjoin the dissemination of future issues of a publication because its past issues had been found offensive." This alone, the Court stated, was enough to condemn the statute, without any reference to the fact that *Near* involved not obscenity, but matters derogatory to public officials, *i.e.,* politics.

In neither the *Near* case nor the instant case does the state seek to condemn that which is wholesome or deserving of protection, yet the flaw of both statutes is that in preventing the dissemination of the unwholesome it prevents the dissemination of that which is presumed to be legal and protected by the first amendment without a prior judicial determination of illegality.

Times Film Corp. v. *Chicago,* 365 U.S. 43 (1961) held that prior restraints are not per se unconstitutional, however, and the *Near* case itself left open to the state the possibility of presenting "exceptional circumstances" the showing of which would permit a valid prior restraint of first amendment activities. Among the several examples of situations in which previous restraint of speech may be allowable is: "the primary requirements of decency may be enforced against obscene publications." *Near* v. *Minnesota,* 283 U.S. at 716.

Near does not suggest, however, that even within these exceptional cases there might not be room for in-

valid restraints, and *Freedman* v. *Maryland*, 380 U.S. 51 (1965), made this clear when it set forth guidelines for permissible prior restraints:

> First, the burden of proving that the film is unprotected expression must rest on the censor . . . .
>
> Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression . . . . [O]nly a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint . . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution . . . . [T]he procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

380 U.S. at 58-59. The language of *Freedman* has been reemphasized in *Southeastern Promotions, Ltd.*, 43 U.S.L.W. at 4370.

Freedman was specifically concerned with the licensing requirement imposed upon film exhibitors. Although the instant case imposes a reverse situation, we have found

that it operates, in effect, as a censoring-licensing statute. The *Freedman* language thus gives a great deal of guidance to our decision in the instant case. The key to the *Freedman* case seems to be initial suppression for the shortest fixed period of time until a judicial determination is made and then final suppression *only* after a judicial determination in an adversary context.

By instituting the injunction procedure for a public nuisance, however, the State of Texas is not interested in preserving the *status quo*. The injunction seeks to change the situation by preventing the dissemination of obscenity, but it does not provide for a short fixed time in which a final determination of obscenity can be made.

With this mind we turn to the procedural framework in which the public nuisance statute operates. The specific requirements of obtaining an injunction in Texas, which would presumably be utilized in actions pursuant to article 4667, leave much to be desired if they are used in the obscenity context. Rules 680-693(a) of the Texas Rules of Civil Procedure provide the injunction procedures for Texas. Pursuant to those rules, the state could obtain a temporary restraining order lasting up to ten days, ex parte. As soon as possible, within that ten days, however, a hearing on a temporary injunction is obtainable. The temporary injunction is not a final adjudication on the merits but, once it is obtained, there is no provision for treating the case any differently from any other civil case. The lack of a provision for a swift final adjudication on the obscenity question raises serious doubts of the constitutional usability of the injunction process in Texas for an obscenity situation.

Article 4665 provides that evidence of "general reputation" is also admissible to prove the existence of the nuisance. The rather vague term leaves in constitutional

doubt the means by which the prosecution would prove the obscenity alleged. Certainly it leaves open the strong possibility that a constitutional definition of obscenity would not be used. Articles 4666 and 4667 do not even provide by their terms any judicial determination of obscenity prior to the issuance of the injunction. Thus, it is seen that the Texas public nuisance statute does not even begin to fit into the guidelines for permissible prior restraints.

Article 4667(3) of Vernon's Annotated Civil Statutes operates as an invalid prior restraint on the first amendment rights of those who commercially manufacture, distribute, or exhibit materials which may be thought by the state to be obscene but which have not yet been judicially determined to be obscene. For that reason this court hereby declares that article 4667(3) of Vernon's Annotated Civil Statutes is unconstitutional on its face.

III. *Richard Dexter* v. *Ted Butler, SA 74-CA-168.*

The facts of this case are very simple. On four successive occasions—June 24, 1974, June 28, 1974, July 2, 1974, and July 6, 1974—an officer of the San Antonio, Texas, police force entered the Fiesta Theatre, paid the $5 admission charge, and viewed the film "Deep Throat." After viewing the film, he wrote out a report and signed a "Motion for Adversary Hearing" to determine whether or not there was probable cause to seize the film for violating the Texas obscenity laws. The motion was presented to a magistrate who ordered the cause set for a hearing. The plaintiff, who was either merely an employee of the Fiesta Theatre or was its lessee and manager, it matters not to the decision in this case, was notified of the hearing and was advised to call his attorney. Within a half hour to an hour, on each occasion, the hearing

was begun. The plaintiff, after consulting with his attorney, waived counsel at the hearing. The hearing was conducted in an unwavering pattern. First, the officer who had viewed the film was called to the stand to testify as to the contents of the film, then the film was viewed by the magistrate. After the viewing of the film, the magistrate issued a search warrant to seize the film and to seize the projector as a "criminal instrument" pursuant to § 16.01 of the Texas Penal Code. On the first three occasions, the plaintiff was then arrested, either alone or in company with another theater employee, and charged with "use of a criminal instrument," and "commercial obscenity" in violation of § 43.23 of the Texas Penal Code. On the fourth occasion, theater employee Wayne Walker alone was arrested and charged with those offenses. Some $55,000 worth of bonds was set on the plaintiff.

After each seizure the theater obtained another copy of the same motion picture, "Deep Throat," and another projector. The theater continued to operate as usual, except when the film was seized and it was necessary to secure another film and another projector.

The charge of commercial obscenity, § 43.23 Texas Penal Code, is a class B misdemeanor. Section 12.22 of the Texas Penal Code provides for a fine not to exceed $1,000, confinement not to exceed 180 days, or both. The misdemeanor charges were set for trial in County Court No. 3, Bexar County, Texas, and it is the court's understanding that they have been tried. The plaintiff has no quarrel in this court with the charges against him brought pursuant to § 43.23. He is challenging, however, the use against him of § 16.01—the criminal instruments statute. That statute provides that it is a class 3 felony and § 12.34 provides for confinement of not more than ten years nor less than two years and a fine not to exceed

$5,000. None of the felony charges of violation of § 16.01 on the plaintiff has been presented to the grand jury for indictment, but felony complaints have been filed in each instance and the cases are "pending" in that sense.

The defendants have based their entire defense upon their contention that this court lacks the jurisdiction to hear the merits of the case because of the *Younger* v. *Harris* doctrine. Defendant has presented no arguments to support the constitutionality of § 16.01 or its application.

The *Younger* v. *Harris* doctrine[6] must give us pause since charges have been filed against the plaintiffs for violation of § 16.01. The criminal cases could be said to be "pending" although the charges have never been presented to the grand jury. What definitely constitutes a pending case has yet to be determined, but even if we unwaveringly held that the cases are "pending," that does not end our discussion. The *Younger* doctrine is not an absolute. Federal intervention, in the proper case, is allowed. The plaintiff asserts that this is the proper case. The defendant maintains that the plaintiff has failed to plead or prove any bad faith harassment or irreparable injury, the absolute prerequisite for a circumvention of *Younger* v. *Harris*. Yet, plaintiff has shown that the defendant, in the latter part of June, 1974, instituted a program of repeated seizures of the film, "Deep Throat," and the projector which showed it, charging theater personnel with not only commercial obscenity, but with felony

6. In 1971 the Supreme Court of the United States decided six cases on the same day which stand for the general proposition that based on considerations of federalism, equity, and comity, federal courts should refrain from enjoining or in any way interfering with pending state court criminal prosecutions, except in very limited circumstances. *Younger* v. *Harris*, 401 U.S. 37 (1971), *Samuels* v. *Mackell*, 401 U.S. 66 (1971), *Boyle* v. *Landry*, 401 U.S. 77 (1971), *Perez* v. *Ledesma*, 401 U.S. 82 (1971), *Byrne* v. *Karalexis*, 401 U.S. 216 (1971), and *Dyson* v. *Stein*, 401 U.S. 200 (1971).

use of a criminal instrument and then failing to present the felony cases to a grand jury. The second seizure of the identical film was not preceded by a judicial determination of the obscenity of the film "Deep Throat." It is obvious that the city of San Antonio was engaged in an "all out" effort to suppress this film. The fourth seizure was the last only because this case was filed in federal court and further seizures were enjoined. In order to fully comprehend the innovative tactics San Antonio put into practice, it is necessary to look at the language of § 16.01 of the new Texas Penal Code:

> Unlawful use of Criminal Instrument.
>
> (a) A person commits an offense if:
>
> (1) he possesses a criminal instrument with the intent to use it in the commission of an offense, or
>
> (2) with knowledge of its character and with intent to use or aid or permit another to use in the commission of an offense, he manufactures, adapts, sells, installs, or sets up a criminal instrument.
>
> (b) For purposes of this section, "criminal instrument" means anything that is specially designed, made, or adapted for the commission of an offense.
>
> (c) An offense under this section is a felony of the third degree.

The words of subpart (b) of the statute clearly indicate that a criminal instrument is not equipment which is designed, made, or adapted for a lawful use, but which incidentally may be used for the commission of a crime. There are many, many common, ordinary, everyday objects which can be used to commit crimes, but these are not criminal instruments. If the clear language of the statute is not sufficient to guide law enforcement officers, the

"Practice Commentary" which immediately follows the statute has been provided by the drafters of § 16.01. Although the "Practice Commentary" does not have the force of law, it does give us as much information as legislative history because, having been written by authorities in the field, it is intended for the practitioner who utilizes the newly enacted statute to give him a better idea of the statute's meaning. The "Practice Commentary" for section 16.01 says:

> It [the statute] aims at terminating incipient criminal activity, the existence of which is indicated by conduct involving a "criminal instrument." The mere possession or manufacture of things specially designed for the purpose of accomplishing a criminal objective is strong evidence of criminal intent. The instrument must be *specially* designed, made, or adapted for the commission of an offense, however; things frequently used in crime, but which have common, lawful uses, are excluded from the purview of Section 16.01 because possession of such things, alone, is conduct too ambiguous for imposition of the criminal sanction . . . .

From this commentary and from the clear language of the statute itself, it can be seen that the statute is not a "use" statute at all. Rather, it is a statute aimed at incipient crime—possession of a criminal instrument, with the specific intent to use the instrument in the commission of a crime. Not only is it not aimed at an instrument which has lawful uses, but it is not aimed at overt criminal actions at all.

Charging the plaintiff with a § 16.01 violation with whatever motive the district attorney now would claim cannot have been undertaken with any design to actually convict the plaintiff of the crime. The articles which

plaintiff possessed are stipulated to be ordinary 16 millimeter portable film projectors. Such a blatant use of an inappropriate statute, which bootstrapped the misdemeanor offense into a felony was effective in requiring that bail for a felony offense be set, not once but several times. The authorities could not believe, however, that Dexter would ultimately be convicted.

Furthermore, San Antonio has engaged in a program of multiple seizures of the same motion picture without any adjudication of obscenity following the first seizures. In the pretrial order the defendant lists as one of its contentions that *Heller* v. *New York* "does not proscribe subsequent arrests and seizures for separate and distinct offenses committed by the same person on separate occasions prior to which complete adversary hearings were conducted by a neutral magistrate." It is hard for the court to see how the district attorney of Bexar County could possibly read *Heller* v. *New York* in this way. The district attorney puts much emphasis on the "adversary hearing" aspect of this case, but we need not unduly concern ourselves with that aspect. The magistrate in *Heller* viewed the film in the theatre, just as the magistrate in this case. In such a situation an "adversary" hearing is not required at all—the film itself is sufficient to establish "probable obscenity" to subject the film to seizure. The fact that the magistrate notified the attorney and gave him the opportunity to appear at a "hearing"—which consisted of nothing more than the testimony of the police officer and the viewing of the film does not transform San Antonio's procedures into an adversary hearing, the results of which would have the force and effect of a final adjudication of obscenity. We assume that San Antonio is asking us to hold that their procedures are something more than an inquiry into the probable obscenity

of the film. This court will not so hold. Bexar County might be commended in other circumstances for its even-handedness in notifying the defense attorney and allowing him to participate in the proceedings, but its actions would not change the function of the hearing which was to determine "probable obscenity."

Heller held that when the magistrate issuing the warrant actually views the entire film, an adversary hearing prior to the siezure of the film is unnecessary because he has a full opportunity for an independent judicial consideration of probable obscenity. It is implicit in the *Heller* opinion, however, that the decision depended upon the fact that after its seizure:

> [O]f course, the film was not subjected to any form of "final restraint," in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to *preserve it as evidence*. There has been no showing that the seizure of a copy of the film precluded its continued exhibition. Nor, in this case, did temporary restraint in itself "become a form of censorship," even making the doubtful assumption that no other copies of the film existed. (No emphasis added.)

413 U.S. at 490. Any way one reads this language, one must come to the conclusion that *Heller* implicitly forbids multiple seizures of the type in which Bexar County engaged.

The import of the *Heller* case was recently analyzed in Judge Taylor's recent opinion, *Bradford* v. *Wade*, 376 F.Supp. 45, 47 (N.D. Tex. 1974):

> [A]t what point can the local authorities seize other copies of the same film that has already been seized? The Supreme Court in *Heller* reaffirmed the proposition that a valid final restraint can only be imposed upon a judicial determination in a full adversary proceeding. The only purpose of seizing a film is for use as evidence. No further copies can be seized until the film is determined to be obscene by a judicial determination on the merits. The Court even said that if the exhibitor does not have another copy of the film, he is to be allowed to copy it for further showing. To not do so, would allow the administrative procedure to become a form of prior censorship.

There is no evidentiary reason why this film should have been seized more than one time. When viewed objectively there is no logical reason why this film was seized four times except that the authorities were attempting to harass the theater and its employees and to eliminate the exhibition of this film—prior to any final judicial determination of its obscenity. It is no answer that the authorities were unsuccessful at their chosen task. Resourcefulness in the face of official harassment should not innure to the benefit of the official harassers.

In a companion case to *Younger* v. *Harris, supra, Perez* v. *Ledesma*, 401 U.S. 82, 27 L.Ed.2d 701 (1971), the Court expressed the exception to its general holding that long standing equitable and comity principles prevent a federal court from interfering with a pending state court criminal prosecution whether by injunction or by declaratory judgment:

> Only in cases of proven harassment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate.

401 U.S. at 85.

The actions of the Bexar County and San Antonio city officials, in the first place, in conducting multiple seizures of the same film, and in the second place, of charging the plaintiff with violation of a statute which is manifestly inappropriate to the situation, together constitute sufficient bad faith harassment and special circumstances to take the case out of *Younger* v. *Harris, supra,* and this court finds that plaintiff has proven harassment *and* prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction. The Fifth Circuit said in *Shaw* v. *Garrison,* 467 F.2d 113 (5th Cir. 1972):

> We hold as the language of *Younger* makes clear, that a showing of bad faith or harassment is equivalent to a showing of irreparable injury for purposes of the comity restraints defined in *Younger*, because there is a federal right to be free from bad faith prosecution. Irreparable injury need not be independently established.
>
> * * *
>
> The finding of a bad faith prosecution establishes irreparable injury both great and immediate for the purposes of the comity restraints discussed in *Younger.*

467 F.2d at 120.

The most important rationale for the holding in *Younger* v. *Harris, supra,* is the belief of the Justices that "defense against a single criminal prosecution" in a state court will in most instances be sufficient to protect any defendant's federal constitutional rights. There is a further serious question in this court's mind of whether or not the plaintiff in this case would be afforded the opportunity to defend himself. He is subject to three felony charges but these had not been brought to the grand jury

at the time of the hearing before the three-judge court—a space of some five months. When asked about the status of the felony cases, the district attorney asserted that his office was under the impression that the temporary restraining order issued by the managing judge prohibited the presentation to the grand jury. The temporary restraining order read, however:

> [D]efendants . . . be and they are hereby restrained and enjoined from further seizures of versions of the film "Deep Throat" at the Fiesta Theatre, San Antonio, Texas and from arresting the plaintiff, or employees of said theatre, so long as "Deep Throat" is showing at the Fiesta Theatre, San Antonio, Texas . . . .

This temporary restraining order was first issued July 29, 1974, and was successively extended over the continuing protest of the defendant. It was superseded by an order entered September 6, 1974, which enjoined, until the three-judge court could meet and decide, "all proceedings and activities with regard to the Plaintiffs in the consolidated cases." Clearly, however, the order excluded from its purview "pending state criminal prosecutions" and left the state "free to bring to trial and try any such cases." Neither of those orders entered by the managing judge was intended to, nor does a clear reading of them lead to the conclusion that they, prevent the state from presenting a case to the grand jury.

This court believes that a further reason for the inapplicability of the *Younger* decision in this case is the fact that the state failed to present these charges to the grand jury and through no fault of the plaintiff has prevented him from defending himself in a state court.

The merits of this case are easily disposed of. The statute, § 16.01 of the Texas Penal Code, is clearly drawn and very specific. Fault lies not with the legislature in this instance but with the local authorities who brought charges under this law. The statute was obviously designed to deal with a very small class of property which can be used only for the commission of crime and to deal with persons in possession of such property or engaged in the manufacture or adaptation of the property exclusively for use in criminal activities, before the criminal activities are undertaken or completed. By no stretch of the imagination could this statute be used to cover the plaintiff's actions or the possession of an ordinary portable 16 millimeter motion picture projector with removable interchangeable reels.

The court declares that it was applied by the Bexar County and San Antonio city authorities unconstitutionally to the plaintiff motion picture exhibitor. Accordingly, having also found the requisite irreparable harm, the court enjoins the state from prosecuting plaintiff Dexter on the pending felony charges pursuant to § 16.01 of the Texas Penal Code, arising from incidents on June 24, June 28, and July 2, 1974, and in future from prosecuting any motion picture exhibitor for possession or use of equipment which can be used for any lawful purpose.

IV. *Ellwest Stereo Theatre, Inc. v. Donald Byrd, et al., CA-3-74-130-E*

The plaintiff in this case operates the Ellwest Stereo Theatre in Dallas, Texas. The theater operates what is referred to in slang terms as a "peep show." A number of viewing booths, said to resemble voting booths, each with its own stool and its own projector are provided for patrons who put coins in a coin slot in order to begin the

operation of the projector. A short motion picture may then be viewed. On January 24, 1974, a police officer of the city of Dallas entered the theater armed with a search warrant issued by a justice of the peace pursuant to § 18.02 (2) of the Texas Code of Criminal Procedure. The officer seized three films and three film projectors. With the aid of tools, three coin boxes with their contents were removed. On January 29, 1974, the police officer again entered the premises of the Ellwest Stereo Theatre with a search warrant issued by a justice of the peace and seized two films, two film projectors and two stools. Walls which formed two viewing booths were also removed with the aid of tools.

The parties stipulated that the projectors, coin boxes, booths, and stools seized by the police on January 27 and 29, 1974, belong to the Ellwest Stero [sic] Theatre, Inc., and that Ellwest Stereo Theatre, Inc., has never been prosecuted for a violation of the Texas obscenity laws, articles 43.22, 43.23, or 43.24 of the Texas Penal Code. This is true despite the fact the property seized has been in police custody since its seizure.

Before approaching the merits of the case, we must decide the jurisdictional questions raised by defendant at oral argument. Defendant contends that since apparently plaintiff has abandoned its claim for injunctive relief, this court has no jurisdiction to hear its remaining claim for declaratory relief.

The court has found only one case in which it is stated that there is no jurisdiction in the three-judge court to hear a declaratory judgment action alone. *Long Island Vietnam Moratorium Committee* v. *Cahn*, 322 F.Supp. 589 (E.D.N.Y. 1970) said in a case in which the plaintiff had represented to the court that no present need for equitable relief existed in view of the fact that the defendant dis-

trict attorney had agreed to hold off his threatened prosecution until the three-judge court had acted:

> [W]e do not consider the representations of the parties to amount to a withdrawal of a request for injunctive relief, without which, of course, this three-judge court would have no jurisdiction.

322 F.Supp. at 561.

The district court cites two Supreme Court cases, *Swift & Co.* v. *Wickham*, 382 U.S. 111, 15 L.Ed.2d 194 (1965), and *Fleming* v. *Nestor*, 363 U.S. 603, 41 L.Ed.2d 1435 (1960). While not inappropriate to the subject matter, these cases are not strong authority for the conclusion reached by the New York court. The *Swift* case concerns the applicability of the three-judge court statute, title 28, section 2281, to a case in which a state statute is challenged on the grounds that it interfered with the supremacy clause of the United States Constitution. Having concluded that the statute was not meant to deal with such questions, the appeal was dismissed for want of jurisdiction. In light of the fact that the declaratory judgment phase of a case is often dealt with by a three-judge court in conjunction with a plea for an injunction, it is not jurisdictionally improper for a three-judge court to hear a declaratory judgment case. In the *Fleming* case the constitutionality of a federal statute was "drawn into question," in a suit seeking the reversal of the decision of the Secretary of Health, Education and Welfare pursuant to the social security laws. The case decided that when the constitutionality of a statute is drawn into question, but no injunction is sought, a three-judge court is inappropriate.

In the case to which defendant has cited us, *Triple A Realty, Inc.* v. *Florida Real Estate Commission*, 468 F.2d

245 (5th Cir. 1972), a single district judge had entered a declaratory judgment that a Florida statute was unconstitutional. The district judge went further to enjoin the state from using this statute. The state appealed on the grounds that a single judge had no authority to issue an injunction and the Fifth Circuit agreed. The court held:

> It is well settled that a three judge panel is required to enjoin state officers from enforcing a state statute. There are several exceptions, however, and the three-judge statute has long been regarded as a highly technical rule which is to be construed strictly. One well-recognized exception is that actions for declaratory judgments, despite some similarity in result with actions for injunctions, are sufficiently different to fall outside the three-judge requirement. *Mitchell* v. *Donovan*, 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed. 378 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

The case does not hold, therefore, that it is jurisdictionally impossible for a three-judge court to hear a declaratory judgment. The *Mitchell* v. *Donovan* case cited by the Fifth Circuit in the quotation above concerns 28 U.S.C. § 1253, which provides for direct appeal to the Supreme Court of cases in which a three-judge court has granted or denied an injunction. The Supreme Court held that the losing party *could not* directly appeal to the Supreme Court a three-judge court's decision which did nothing more than issue a declaratory judgment. The case was not concerned with whether or not a three-judge court *could* issue a declaratory judgment alone or under what circumstances. In *Kennedy* v. *Mendoza-Martinez*, the plaintiff amended his declaratory judgment complaint to include a prayer for injunctive relief just before the beginning of the third trial in the case. However, the issues were framed for

trial to exclude any injunctive relief, and the single district judge who heard the case never mentioned it in his memorandum opinion, findings of fact and conclusions of law, or his judgment. A declaratory judgment only was granted. The Supreme Court concluded that since no injunctive relief was really at issue, there was no reason to convene a three-judge court and the single judge's decision could stand. The Court continued:

> Whether an action solely for declaratory relief would under all circumstances be inappropriate for consideration by a three-judge court we need not now decide, for it is clear that in the present case the congressional policy underlying the statute was not frustrated by trial before a single judge.

372 U.S. at 154.

It would appear to this court that that question is still open and that this court is free to decide the issue, taking into consideration all of the circumstances surrounding the suit. In his original complaint filed February 13, 1974, plaintiff sought both injunctive and declaratory relief. On May 1, 1974, Judge Brown consolidated the case into the already existing block of cases for purposes of deciding the constitutionality of the obscenity statute. As late as September 4, 1974, when the complaint was amended, plaintiff was still seeking an injunction in addition to declaratory relief. Although the pretrial order does not seek injunctive relief, plaintiff's brief addresses itself fully to the question and all but invites the court to grant injunctive relief. Although plaintiff has not presented the point very precisely, the court cannot say that he has truly abandoned any claim for injunctive relief. Nor can we say that even if he did so abandon his claim at the eleventh hour it would be jurisdictionally inappropriate to hear the case given the circumstances. We

therefore hold that plaintiff's claim for a declaratory judgment is properly before this three-judge court and will proceed to the second jurisdictional challenge.

Defendant has alleged that there is no case or controversy here, nor a substantial federal question presented because the plaintiff corporation has not been charged with any crime. The court believes that this fact is irrelevant to the determination of the question of [sic] case or controversy. The City of Dallas and the State of Texas have utilized their police powers against the corporation by seizing and retaining its property pursuant to a search warrant issued under article 18.02 of the Texas Code of Criminal Procedure. This presents a case or controversy, *i.e.*, a live grievance. *Goosby* v. *Osser*, 409 U.S. 512, 35 L.Ed. 36 (1972). Inasmuch as the plaintiff is engaged in the dissemination of motion pictures, presumptively protected by the first amendment to the United States Constitution, and the actions of the state have served to curtail that activity to some extent, the plaintiff has presented to the court a *question* which has substantial first and fourteenth amendment overtones worthy of consideration. Whether or not plaintiff's claim is meritorious, however, remains to be seen.

Younger v. *Harris* does not appear to be an issue in the instant case. It was not raised in the pretrial order, in the briefs, or at oral argument. There are no pending criminal prosecutions, at least against the plaintiff here. It has been intimated that there exist criminal prosecutions against individuals arising out of these seizures, but the court is completely unaware of the identity of the individuals involved or of exactly how or even if the property seized was used in prosecutions directed against them. In the recent case *Steffel* v. *Thompson*, 415 U.S. 452, 471 (1974), the Supreme Court states

in footnote 19: "The pending prosecution of petitioner's handbilling companion does not affect petitioner's action for declaratory relief." The footnote continues with a reference to *Roe* v. *Wade*, 410 U.S. 113 (1973), in which the pending prosecution of a doctor under the Texas abortion laws did not foreclose a declaratory judgment in favor of a pregnant woman against whom no prosecution was pending. Finding no jurisdictional, equitable, comity, or federal bar to the maintenance of this suit, the court will proceed to the merits.

Article 18.02(2) of the Penal Code of Texas as amended effective January 1, 1974, reads:

> [A] search warrant may be issued to search for and seize . . . (2) property specially designed, made, or adapted for or commonly used in the commission of an offense.

Plaintiff has asserted that article 18.02(2) is void on its face and as it applied to plaintiff for three reasons: (1) it places and enforces a prior restraint on material presumptively protected by the first amendment; (2) it is vague and overbroad; and (3) it fails to provide fair notice to persons affected by the statute of the items it proscribes.

As we have pointed out in our discussion of the *King Arts Theatre* case, the question of what is and what is not a permissible "prior restraint" is an involved one. Calling the use of article 18.02(2) a "de facto prior restraint" is, to this court, a confusion of the issues. In essence, the plaintiff is complaining that under the guise of searching for and seizing as evidence property which "is specially designed, made or adapted for or commonly used in the commission of a crime," the state can, to

some extent at least, "shut down" the operations of an adult motion picture business.

The State argues that assuming that the motion pictures shown by the plaintiff corporation were obscene and knowing as we do that Texas has laws to prevent the commercial showing of obscenity, we are left with the indisputable fact that the equipment seized is equipment "commonly used in the commission of a crime."

In order to accept the state's argument, however, we must assume that the motion pictures shown were indeed obscene. This we cannot assume. Motion pictures are protected by the first amendment. Only if they are judicially judged to be *obscene*, using the guidelines set forth by the Supreme Court, do they cease to be protected by the first amendment. While it is true that the showing of a motion picture can be a crime, it is not a crime until it has been judicially determined to be so. This fact takes motion picture obscenity cases out of the realm of crimes such as gambling. A gambler may have a business and he may utilize gambling machines and instruments to carry on his business. The police, using article 18.02(2), may come in with a search warrant and seize all of his equipment, effectively shutting down his business. Such a case would not disturb a court for one reason: the gambler does not have any protections which fall outside the due process requirements of a state's criminal laws. The adult motion picture proprietor, however, no matter how lewd his neighbors and the police and the district attorney's office may think his business to be, has an added protection—the protection of the first amendment. Until the items which he shows are each proved obscene, he can show anything he wants to show. The police cannot shut down or attempt to shut down his business. *Cf. Marcus* v. *Property Search Warrants*, 367 U.S. 717, 730-731 (1961).

The state claims, however, that all it was attempting to do was to gather evidence for the trial of obscenity cases and the instruments used in the business were evidence of the crime. Certainly, projection equipment, coin boxes, stools, and portions of booths would not be relevant evidence in the trial of a case alleging commercial exhibition of obscene materials. Proof of the obscenity would seem to rise or fall with the material exhibited, not with equipment used to exhibit the materials. The Dallas city attorney asserted at the oral argument that the booth walls were seized as evidence of pandering. Once again we can only guess at the way in which pandering could be proved by the physical presence of the booth in the courtroom, as distinguished from a photograph of the wall or a lab report of any substances found upon the booth itself. The explanation of the seizure of the booth walls does not explain why or how the projecting equipment, the stools, and the coin boxes are evidentiary and none was offered.

In a case which does not involve the first amendment, this court might accept the "evidence" argument advanced by the City. It is too tenuous, however, when placed in the light of the first amendment. The law enforcement officers entered the theater not once but twice. Each time they seized not only the film shown but also the coin box and projector attached to each booth. Whether intentional or not, and we need not make such a finding here, their actions served to curtail the operation of the business. It is true that the theater has not been put out of business, but this appears to be the result of the "informal agreement," entered into by the parties before Judge Mahon, not to pursue the matter until this three-judge court had made its decision.

The state cites to us *Heller* v. *New York, supra,* asking us to hold that motion picture projection equipment is to be held to the same standards as the motion picture itself:

> [I]t appears consistent with the rationale of *Heller* to permit a seizure of projection equipment provided (1) such equipment is seized for a bona fide evidentiary purpose and not to suppress exhibitions of films and (2) seizure of equipment is made under the same procedural limitations applicable to film seizures under *Heller.*

Defendant's Brief, p. 5. The City in this instance has demonstrated an admirable understanding of the *Heller* case but has failed to show this court that there is any bona fide evidentiary purpose for the equipment seized here. Furthermore, all of the stipulated facts point to something far removed from a valid evidentiary search. This was a "raid," accompanied by crowbars and screwdrivers. *Heller* also stands for the proposition that these businesses were not to be shut down but were, on the contrary, to be allowed to continue with a minimum of disruption until obscenity had been proved. The officials in the instant case seem to have sought the maximum amount of disruption of the business.

The fact that the officials in the instant case abused the use of article 18.02(2), however, does not necessarily render that statute facially unconstitutional. The statute is worded to take care of several situations, but it should be precise enough to guide officials acting in good faith. Examining the entire language of article 18.02 leads one to the conclusion that the words "commonly used in the commission of an offense" are superfluous and ambiguous. It is obvious that article 18.02(2) was written as a companion to section 16.01 of the new penal code which we

dealt with above in the *Dexter* case. Section 16.01 refers only to property specially designed, made, or adapted for the commission of an offense, making its possession, manufacture, adaptation, sale, installation, or setting up with knowledge and intent a criminal offense. Article 18.02 provides for a search warrant for "property specially designed, made, adapted for *or* commonly used in the commission of an offense." Section 16.01, Practice Commentary, informs us that the statute was intended to catch the crime before it is committed. It excludes the "commonly used" or similar language because it would be too ambiguous for criminal culpability.

Since obtaining a search warrant deals only indirectly with criminal culpability, one assumes the legislature felt safe in keeping the "commonly used" language in the statute for use in ambiguous or close cases. After all, in the ordinary situation the statute providing for the issuance of a search warrant need not be too specific as long as the search warrant itself is specific. No doubt the legislature failed to foresee that the imprecision of the statute would result in the situation we face here. The language in this situation has become a carte blanche for the authorities who can issue search warrants for items, the possession or manufacture of which cannot, under section 16.01, be crimes, since as we have determined in our treatment of *Dexter* v. *Butler*, above, section 16.01 is intended for only a very limited and specific class of property. The effect is more than incidental to the motion picture exhibitor who is presumptively protected by the first amendment.

What disturbs this court is the fact that as the statute is worded, there is no bona fide evidentiary purpose which the "commonly used" language could serve. In the first amendment area, even as the state argues, precision is

essential. Although in most cases it is assumed that bona fide evidentiary purposes are the basis of searches and seizures, as is evident in this case, seizures in the first amendment area may not be for evidence at all. Article 18.02(2) as it is written is wide open to such abuses. It fails to guide the police officer swearing out the warrant or the magistrate issuing the warrant who later reviews the search and seizure under articles 18.09, 18.12, and 18.13. In the instant case the evidentiary value of the items seized (except the motion pictures themselves) is *de minimis* at best, but the threat to the first amendment rights of the theater owner is very great.

Would the striking out of the "commonly used" language create a gap, however, in the valid enforcement of other criminal laws? The subsections of amended article 18.02 (1) through (9) provide for every possible contingency in which a search warrant could be needed:

> Art. 18.02 Grounds for issuance
>
> A search warrant may be issued to search for and seize:
>
> (1) property acquired by theft or in any other manner which makes its acquisition a penal offense;
>
> (2) property specially designed, made, or adapted for or commonly used in the commission of an offense;
>
> (3) arms and munitions kept or prepared for the purpose of insurrection or riot;
>
> (4) weapons prohibited by the Penal Code;
>
> (5) gambling devices or equipment, altered gambling equipment, or gambling paraphernalia;
>
> (6) obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;

(7) drugs kept, prepared, or manufactured in violation of the laws of this state;

(8) any property the possession of which is prohibited;

(9) implements or instruments used in the commission of a crime.

The "commonly used" language of subsection (2) is completely unnecessary not only because there is no corresponding crime for which the property could be used to establish the offense but also because the magistrate does not have to be convinced to a certainty that the property sought is "specially designed, made, or adapted for the commission of an offense," he simply must determine whether or not there is probable cause to believe the property fits the category. When the property is received by the magistrate pursuant to article 18.09, article 18.12, and article 18.13, he can make a better determination.

Accordingly, this court declares that the language of article 18.02(2), "or commonly used in," is unconstitutionally vague and overbroad, is unconstitutional as applied to Ellwest Stereo Theatres, Inc., or any other individual or entity engaged in first amendment activities, in that its use can result in the seizure of equipment and materials which can be used for the exhibition of constitutionally protected items, not for the purpose of obtaining evidence, but for the purpose of shutting down first amendment activities offensive to the authorities before a judicial determination of obscenity.

V. *Conclusion*

This three-judge court, having ruled on the merits of the three cases, will dismiss these cases.

The remainder of the cases, found in the Appendix to this order, will be remanded to the single judge from whom they came. Each judge will hold a hearing on the question of bad-faith harassment or other special circumstances to determine if the case falls outside *Younger* v. *Harris*, 401 U.S. 37 (1971), or *Huffman* v. *Pursue, Ltd.*, 43 U.S.L.W. 4379 (March 18, 1975). Should the single judge determine that there is no bad-faith harassment or special circumstances, the cases will be dismissed by that judge in accordance with *Hunt* v. *Rodriguez*, 462 F.2d 659, *rehearing granted in part*, 468 F.2d 615 (5th Cir. 1972).

Should the single district judge find bad-faith harassment or special circumstances, this three-judge court will receive the cases back and dispose of them in accordance with this opinion.

In the instances in which the single district judge has already found no bad-faith harassment, this court will dismiss those cases.

DONE at Houston, Texas, on this 3rd day of July, 1975.

/s/ Joe Ingraham
United States Circuit Judge

/s/ John V. Singleton
United States District Judge

/s/ W. M. Taylor
United States District Judge

APPENDIX

Cases pending before the three-judge court styled *Universal Amusements* v. *Vance*, C.A. 73-H-528:

Universal Amusements v. Carol Vance, C.A. 73-H-528 S/D
Jones v. Dyson, C.A. 3-7024-C N/D
Associated Theatres v. Dyson, C.A. 3-7398 N/D
Associated Theatres v. Wade, C.A. 3-7347 N/D
Hargrove v. Hill, C.A. 73-H-1114 S/D
Southland Theatres v. Butler, SA-72-CA-214 W/D
San Antonio Bookmart v. Smith, A-74-CA-078 W/D
Ellwest Theatres v. Walls, CA-4-74-45 N/D
Cinema X v. Curry & Walls, CA-4-74-28 N/D
Sun Family Entertainment v. Hanna, B-74-142-CA E/D
Wells v. Miles, A-74-CA-189 W/D
Cook v. Peters, SA-74-CA-176 W/D
Carson v. Baily, CA-7-74-65 N/D
Claybrook v. Baily, CA-7-74-43 N/D
Lovely v. Driver, CA-7-74-45 N/D
McKenzie v. Butler, SA-74-CA-315 W/D
Gernon v. Simpson, A-75-CA-34 W/D

Dismissed by this Order:

King Arts v. McCrea, CA-6-345 W/D
Dexter v. Butler, SA-74-CA-168 W/D
Ellwest v. Byrd, CA-3-74-130-E N/D

APPENDIX B

amended opinion & order

V. *Conclusion*

This three-judge court, having ruled on the merits of the three cases, directs counsel for plaintiffs in each of the three cases to prepare a form of judgment in each of these three cases consistent with this opinion and to do so within thirty (30) days of the date hereof and submit same to counsel for the defendants for approval as to form and then submit same to this three-judge court for approval and entry.

The remainder of the cases, found in the Appendix to this order, will be remanded to the single judge from whom they came. Each judge will hold a hearing on the question of bad-faith harassment or other special circumstances to determine if the case falls outside *Younger* v. *Harris*, 401 U.S. 37 (1971), or *Huffman* v. *Pursue, Ltd.*, 43 U.S.L.W. 4379 (March 18, 1975). Should the single judge determine that there is no bad-faith harassment or special circumstances, the cases will be dismissed by that judge in accordance with *Hunt* v. *Rodriguez*, 462 F.2d 659, *rehearing granted in part*, 468 F.2d 615 (5th Cir. 1972).

Should the single district judge find bad-faith harassment or special circumstances, this three-judge court will receive the cases back and dispose of them in accordance with this opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 73-H-528

UNIVERSAL AMUSEMENTS, ET AL,

V.

CAROL VANCE, ET AL,
CONSOLIDATED WITH

Civil Action No. SA-74-CA-168

RICHARD C. DEXTER,

V.

TED BUTLER, ET AL,

Civil Action No. SA-73-CA-214

SOUTHLAND THEATERS, INC.,

V.

TED BUTLER, ET AL,

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ted Butler, et al, Defendants in the above entitled and numbered causes, hereby appeal to the Supreme Court of the United States from the untitled opinion and order granting a permanent in-

junction and dismissing the complaints, filed in these causes on July 3, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1253.

August 22, 1975

Ted Butler
Criminal District Attorney
Bexar County, Texas

Nelson Atwell
Assistant Criminal District Attorney

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/s/ Keith W. Burris
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Attorneys for Defendant

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 73-H-528

UNIVERSAL AMUSEMENTS, ET AL,

V.

CAROL VANCE, ET AL,

CONSOLIDATED WITH

Civil Action No. SA-74-CA-168

RICHARD C. DEXTER,

V.

TED BUTLER, ET AL.,

Civil Action No. SA-73-CA-214

SOUTHLAND THEATRES, INC.,

V.

TED BUTLER, ET AL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ted Butler, et al, Defendants in the above entitled and numbered causes, hereby appeal to the Supreme Court of the United States from the memorandum opinion and order granting a permanent injunction, filed in these causes on July 3, 1975, and

amended on August 29, 1975, and the judgments to be entered in accordance therewith.

This appeal is taken pursuant to 28 U.S.C. § 1253.

SEPTEMBER 5, 1975

Ted Butler
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APPENDIX E

VERNON'S TEXAS PENAL CODE OF 1974,

SECTION 16.01

Section 16.01. Unlawful Use of Criminal Instrument

(a) A person commits an offense if:

(1) he possesses a criminal instrument with intent to use it in the commission of an offense; or

(2) with knowledge of its character and with intent to use or aid or permit another to use in the commission of an offense, he manufactures, adapts, sells, installs, or sets up a criminal instrument.

(b) For purposes of this section, "criminal instrument" means anything that is specially designed, made, or adapted for the commission of an offense.

(c) An offense under this section is a felony of the third degree.

VERNON'S TEXAS PENAL CODE OF 1974,

SECTION 43.21

§ 43.21. Definitions

In this subchapter:

(1) "Obscene" means having as a whole a dominant theme that:

(A) appeals to a prurient interest in sex, nudity, or excretion;

(B) is patently offensive because it affronts contemporary community standards relating to the

description or representation of sex, nudity, or excretion; and

(C) is utterly without redeeming social value.

(2) "Material" means a book, magazine, newspaper, or other printed or written material; a picture, drawing, photograph, motion picture, or other pictorial representation; a statue or other figure; a recording, transcription, or mechanical, chemical, or electrical reproduction; or other article, equipment, or machine.

(3) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion that goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(4) "Distribute" means to transfer possession, whether with or without consideration.

(5) "Commercially distribute" means to transfer possession for valuable consideration.

VERNON'S TEXAS PENAL CODE OF 1974,

SECTION 43.23

§ 43.23. Commercial Obscenity

(a) A person commits an offense if, knowing the content of the material:

(1) he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial dis-

tribution, or commercial exhibition any obscene material;

(2) he presents or directs an obscene play, dance, or performance or participates in that portion of the play, dance, or performance that makes it obscene; or

(3) he hires, employs, or otherwise uses a person under the age of 17 years to achieve any of the purposes set out in Subdivisions (1) and (2) of this subsection.

(b) It is an affirmative defense to prosecution under this section that the obscene material was possessed by a person having scientific, educational, governmental, or other similar justification.

(c) An offense under this section is a Class B misdemeanor unless committed under Subsection (a)(3) of this section, in which event it is a Class A misdemeanor.

UNITED STATES CODE, TITLE 28, SECTION 2281

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

UNITED STATES CODE, TITLE 28, SECTION 2284

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant

a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. As amended June 11, 1960, Pub.L. 86-507, § 1(19), 74 Stat. 201.

RULE 65 (b), FEDERAL RULES OF CIVIL PROCEDURE

Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such

shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

APPENDIX F

SUPERIOR COURT OF THE DISTRICT
OF COLUMBIA
SPECIAL PROCEEDINGS SECTION

No. SP 134-75

UNITED STATES

V.

ONE COMPLETE COPY OF MOVIE FILM
ENTITLED "DEEP THROAT"

MEMORANDUM ORDER

This matter comes before the Court upon the government's application to seize a certain copy of the film entitled "Deep Throat" presently being exhibited in a District of Columbia theater.

On December 17, 1974, a different but identical copy of that film was seized from the same theater by officers of the Metropolitan Police Department pursuant to a search warrant issued by a judge of this Court on the strength of a detective's affidavit which described in detail what the film portrayed. The basis for its seizure was that it was being exhibited in violation of D.C. Code 1973, §22-2001, which prohibits, *inter alia*, the presentation of any obscene, indecent or filthy motion picture. Shortly

after that seizure an adversary hearing on the obscenity of the film was scheduled. However, it was not held because the theater was closed for reasons not pertinent to this proceeding.

Subsequently the theater reopened and commenced to show an identical copy of the film which had been seized. The government then petitioned the Court for an adversary hearing to determine the obscenity of the film (Superior Court Special Proceeding No. 69-75). When the matter came before the Court for hearing on January 17, 1975, an attorney entered his appearance for the corporation which operates the theater in question and for the corporation's president. He stated that his clients (1) did not challenge the propriety of the issuance of the search warrant pursuant to which the film was seized on December 17th, (2) did not question the legality of that seizure or the retention of the film by the government pending any criminal proceedings in connection with the use of the film, and (3) waived any claim that their constitutional rights under the First Amendment or any other part of the Constitution were being or would be violated by the government's prosecution of criminal proceedings against them. When asked by the Court, government counsel was unprepared to state whether the government would attempt to seize the identical copy of the film which was being shown subsequent to the reopening of the theater. Counsel for the prospective defendants stated that it was the availability of that copy which led his clients to make the concessions recited above and to object to the holding of an adversary hearing. Under the circumstances, this Court declined to hold an adversary hearing.

On January 21, 1975, the government filed an information charging the president of the corporation which op-

erates the theater with violation of D.C. Code 1973, §22-2001(a) (1) (B), a misdemeanor, to which he entered a plea of not guilty. Trial is presently scheduled for March 24, 1975. *United States* v. *Proferes*, Crim. No. 4375-75.

On January 27, 1975, the government determined that it would attempt to seize the identical copy of "Deep Throat" which was still being exhibited in the Mark II theater. Government counsel presented to the Court both an application for a search warrant and a petition for order to show cause directing the custodian of the film in question to show cause why the Court should not issue the warrant authorizing seizure of the film. The government at that time sought a court order that the custodian immediately deposit the identical copy of the film with the court. The Court declined to order the film's immediate deposit or to issue the search warrant prior to completion of the requested show cause hearing, which would constitute an adversary hearing. The hearing was held in part on January 28th, and the copy of the film which had been seized on December 17, 1975, was viewed by the Court and counsel. The hearing was recessed until January 31, 1975, in order to permit counsel for the exhibitor to adduce testimony. Following the reception of that testimony and oral argument of counsel, the matter was taken under advisement.

The determination whether there is probable cause to conclude that the film in question is obscene is not a difficult one. The film contains scenes of explicit heterosexual intercourse emphasizing fellatio and also including group sex, explicit penetration, cunnilingus, female masturbation, anal sodomy, and seminal ejaculation. Those portrayals entirely dominate the film. Maximum emphasis upon the genitalia is achieved by means of close-ups and

camera angles. There is little else to the movie aside from a short but pretentious printed "preamble" which attempts to explain, in terms used in the field of psychiatry, the incidental story line of the film. It is clear that an application of the standards of *Miller* v. *California*, 413 U.S. 15 (1973), to "Deep Throat" must lead this Court to the conclusion[1] that an average person applying contemporary community standards would find that the work taken as a whole appeals to prurient interests, that it depicts in a patently offensive way sexual conduct which has been defined as obscene by judicial decisions applicable in this jurisdiction, and that the work taken as a whole lacks any serious literary, artistic, political, or scientific value. The Court concludes not only that there is probable cause to believe that the film is obscene but also that for purposes of the present proceeding the film is obscene.[2]

The foregoing conclusion brings us to the more difficult aspect of the matter before the Court. The government, while retaining for use at trial the film seized on December 17, 1974, seeks seizure of the exhibitor's second copy of the film. While the government asserts that it needs that copy for evidentiary purposes, that contention is unconvincing for the reason that exhibitor's counsel and government counsel have stipulated that the two copies are identical. Exhibitor's counsel has further agreed that this stipulation may be considered a part of the record in the criminal action pending against the exhibitor for the ex-

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1. The conclusion that "Deep Throat" is obscene is based entirely on the evidence adduced at the adversary hearing. It is noted that numerous courts have so found it or have upheld administrative decisions to the same effect, e.g., United States v. One Reel of Film, 481 F.2d 206 (1st Cir. 1973); Mangum v. Maryland State Board of Censors, 328 A.2d 283 (Ct. App. Md. 1974).

2. The distinction between the finding of mere probable cause and the finding of obscenity may be crucial. Blount v. Rizzi, 400 U.S. 410, 420 (1971). This finding is not intended to and cannot usurp the jury's function.

press purpose of permitting the government, should it see fit to do so, to prosecute the exhibitor for separate violations of law for every showing of the film from the time the theater reopened until the matter is finally decided by a jury. The government advances two other grounds for seizure: that the film now sought is illegally possessed, and that it is being used to commit repeated criminal offenses. D.C. Code 1973, §23-521. The exhibitor counters with the argument that the proposed seizure amoumts to a bad-faith effort to effect confiscation and censorship prior to a jury trial on the merits.

The controlling question is whether the exhibitor is correct in his contention that he is entitled to a jury verdict on the issue of obscenity before the showing of the film may effectively be enjoined or whether, on the other hand, the requirement that there be no restraint upon a showing of the film prior to a judicial determination of obscenity is satisfied by a determination of the type which this Court has just reached on the basis of the adversary hearing.

In deciding this issue, the Court is cognizant of the legitimate interest of the state in the preservation of public morals against corrupting influences. *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1973). On the other hand, the danger of abridging constitutional rights, including those guaranteed by the First Amendment, is one to which we must be continuously alert. In the case at bar it is necessary to be especially sensitive to the fact that if the government is correct in asserting that it should be authorized to seize the copy of "Deep Throat" now being shown, the government will also be entitled to seize any further copies of that film which the exhibitor may have or obtain and thereby preclude further exhibition of the film pending trial on the merits.

An exhaustive review of relevant decisions of the Supreme Court leads to the conclusion that once a full adversay hearing has been held and both sides have been afforded the opportunity to be heard on the issue of obscenity the requirements of the Constitution have been satisfied and a court may authorize seizure of materials deemed obscene not only for use as evidence but also pursuant to D.C. Code 1973, §23-521, as property which is "illegally possessed" or "to be used to commit . . . a criminal offense." *Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205 (1964); *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957). This conclusion is entirely consistent with *Heller, supra.*[3]

In view of the foregoing determination as to the obscenity of "Deep Throat", it is concluded that the government has satisfied its burden of persuading the Court that the requested search warrant should issue. It is recognized that the procedure followed here falls short of the ideal since the ultimate decision as to obscenity will be made by a jury in this case rather than by a judge. On the other hand, the rule suggested by counsel for the exhibitor that no action which has the effect of precluding further exhibition can be taken prior to the decision of a jury would be inimical to the public interest. Such a rule would prohibit for weeks, or in the case of a felony

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3. A careful reading of Heller reveals that the language therein which distinguishes its fact pattern from others which might involve seizure of multiple copies of a film as cumulative evidence or action which precludes exhibition relates to the period prior to a full adversary hearing. Two federal courts have construed Heller to require authorization of continued exhibition until a trial on the merits. Art Theater Guild, Inc. v. Parrish, 503 F.2d 133 (6th Cir. 1974); Bradford v. Wade, 376 F. Supp. 45 (N.D. Tex. 1974). Neither of those opinions, however, addressed itself expressly to the consequences of the holding of a full adversary hearing. *But see* Inland Empire Enterprises, Inc. v. Morton, 365 F. Supp. 1014 (C.D. Cal. 1973), which in dicta suggests the result reached here.

indictment for months, any judicial action to preclude an exhibition even more offensive that "Deep Throat", e.g., a film depicting abuse of children or live performances of a grossly obscene nature.

The trial of *United States* v. *Proferes*, is scheduled for March 24, 1975. This Court is not aware of the reason for the setting of that relatively late trial date and is of the view that the trial date should be advanced. The Criminal Calendar Control Judge has informed this Court that this case will be given the highest priority so that any impingement upon the right of the exhibitor to show the film or the right of the public to see it will be minimized. The Superior Court stands ready to commence with the trial upon the merits within a week. Accordingly, counsel for the parties are instructed to appear before the Criminal Calendar Control Judge at 2:00 p.m. on February 7, 1975, for a hearing upon the defendant's motion to dismiss and, if it should not be granted, the rescheduling of a trial on the earliest possible date.

Accordingly, it is by the Court this 6th day of February, 1975,

ORDERED that the application of the United States for issuance of the warrant for the seizure of the copy of the film "Deep Throat" described with particularity in the warrant and accompanying affidavit be and it hereby is granted.

/s/ James A. Belson
James A. Belson, Judge

cc: Counsel